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No.

IN THE

Supreme Court of the United States

CHARLES M. HANEY, JR., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Amendment right to conflict-free counsel guaranteed in all twelve federal circuits has been violated in a prosecution under the Uniform Code of Military Justice where the senior government prosecuting attorney who actively moved the case toward trial (1) switched sides during the pendency of the prosecution, (2) was appointed as one of petitioner's two defense counsel, (3) conspired with petitioner's co-defense counsel to conceal from the trial judge both the conflict and his status as an appointed defense counsel, and (4) testified against his client's interest at trial.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

No.

CHARLES M. HANEY, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Charles M. Haney, Jr., respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on September 12, 2000.

OPINIONS BELOW

The order of the United States Court of Appeals for the Armed Forces denying reconsideration is reprinted as Appendix A. *United States v. Haney*, No. 93-0157/AF (C.A.A.F. Sep. 12, 2000). The grant of review and summary affirmance order issued by the United States Court of Appeals for the Armed Forces is reprinted as Appendix B. *United States v. Haney*, No. 93-0157/AF (C.A.A.F. Aug. 17, 2000). The unpublished opinion of the United States Air Force Court of Criminal Appeals is reprinted as Appendix C. *United States v. Haney*, ACM 29000 (f rev)(AF Ct. Crim App Nov. 4, 1999).

Previous opinions and orders, in reverse chronological order, are as follows: *United States v. Haney*, 45 M.J. 447 (C.A.A.F. 1996) at Appendix D; *United States v. Haney*, ACM 29000 (f rev)(A.F.C.M.R. May 26, 1994) at Appendix E; *United States v. Haney*, 38 M.J. 229 (C.M.A. 1993) at Appendix F; and, *United States v. Haney*, ACM 29000 (A.F.C.M.R. Aug. 26, 1992) at Appendix G.

JURISDICTION

The final judgment of the United States Court of Appeals for the Armed Forces was entered on September 12, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (2000) and 10 U.S.C. § 867(a)(3) (2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right. . . to have the Assistance of Counsel for his defence.

Article 27(a)(2) of the Uniform Code of Military Justice provides:

> No person who has acted as investigating officer, military judge, or court member in any case may later act as trial counsel, assistant trial counsel, or, unless expressly requested by the accused, as defense counsel or assistant or associate defense counsel in the same case. No person who has acted for the prosecution may act later in the same case for the defense, nor may any person who has acted for the defense act later in the same case for the prosecution.

Art. 27(a)(2), UCMJ (M.C.M. 2000 ed.), 10 U.S.C. § 827 (a)(2)(2000).

STATEMENT OF THE CASE

This case raises the question whether conflict free defense counsel is in fact guaranteed in the military justice system, and whether the standards applied by military appellate courts in reviewing counsel conflict of interest issues meet constitutional norms.

In this general court-martial tried in 1990, the chief prosecuting attorney spent months personally preparing the case for trial. Shortly before trial, he switched sides and became one of two appointed defense counsel. While representing the government, he had played a substantial role, including drafting the charges and inducing petitioner's commander (an official who had the right to dismiss the charges and who believed petitioner to be innocent) to commence the formal judicial process by "preferring" (swearing to) the charges.

After switching to the defense side, the same attorney played an equally active defense role (including evaluating and rejecting crucially important defense evidence), although he never appeared as petitioner's counsel in court. The conflicted counsel conspired with his co-counsel to conceal from the trial judge not only the conflict but even his status as a defense counsel, first by not entering an appearance or being present with petitioner and co-counsel at trial, and second by influencing his co-counsel to affirmatively misstate the composition of the defense to the judge, all in direct violation of mandatory court rules. When the issue as to his role in inducing petitioner's commander to prefer the charges arose at trial, he even testified on behalf of the government and against his client's interests without anyone disclosing to the trial judge the former prosecutor's current status as an appointed defense counsel.

Statement of Facts

After trial, petitioner was found guilty in 1990 of one specification of wrongful use of marijuana and one specification of wrongful use of cocaine in violation of Article 112a, Uniform Code of Military Justice ("U.C.M.J.") (10 U.S.C. § 912a (2000)). He was sentenced to a dismissal, 7 months confinement and substantial monetary forfeitures.

At the time of his trial, Major Haney was an officer with over 19 years of exemplary, unblemished service in both the enlisted and officer ranks of the United States Air Force. His work at the Air Force Space Command at Peterson Air Force Base, CO, in missile test & evaluation was extremely challenging, and required the highest levels of security clearances, including access to several "compartmentalized" sets of top secret information, and at the time of the charged offenses he was performing flawlessly on an extremely complex and demanding mission. The prosecution was initiated solely on the basis of a disputed laboratory report of a 1989 random urinalysis test. There was substantial evidence questioning the validity and reliability of the report, and substantial evidence of petitioner's good military character and character for non-drug abuse.

Captain Robert Watson, the chief prosecuting attorney for Peterson Air Force Base, Colorado, personally oversaw the investigation and processing of petitioner's case from December 1989 until approximately May 1990. As the base legal office's "Chief of Military Justice,"[1] Captain Watson was personally and substantially involved in investigating

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[1] The "Chief of Military Justice" is the attorney who has supervisory responsibility for all military justice matters within the office of the staff judge advocate ("SJA"), a senior attorney who serves as principal legal advisor to the "convening authority" ("CA"). The SJA has overall responsibility for conducting the military justice prosecution function within that command. Convening authorities are military commanders, and generally are not lawyers. CAs play a number of critical roles under the U.C.M.J., the most important of which is to exercise prosecutorial discretion (similar to that exercised by the United States Attorney). CAs thus determine, with the advice of their SJAs, whether a matter will be handled administratively or criminally through trial by court-martial, who will be prosecuted, for what charges, and at what level of court-martial. *See, e.g.*, Art. 22-24, U.C.M.J. Normally, the actual in-court prosecutions are conducted by junior attorneys in the SJA's office. Thus, while it is the CA who exercises prosecutorial discretion, the case preparation is actually done, and the trials are conducted, by more junior attorneys on the SJA's staff. Captain Watson was the most senior of these prosecuting attorneys.

and processing the case against the petitioner, including gathering evidence, coordinating further investigation, obtaining authorization to prosecute from higher headquarters, and representing the government in negotiations with petitioner's original counsel, about alternate dispositions of the case other than by general court-martial. Captain Watson personally drafted the charges against the petitioner, and he formed a personal belief that the charges were true and that petitioner was guilty. He convinced petitioner's commander, Colonel Smith, to initiate the judicial processing of the case under the U.C.M.J. (to swear to and "prefer" the charges), even though Colonel Smith specifically told Captain Watson that he did not believe the charges were true and that he actually believed Major Haney was innocent.

At the time he was initially accused, petitioner was represented by the only defense counsel at Peterson Air Force Base, the "Area Defense Counsel," Captain Brian Koza, who thus became petitioner's appointed (or "detailed") defense counsel. In April, 1990, aware that he was scheduled for transfer overseas, Captain Koza arranged for Captain Israel B. Willner, a "circuit" defense counsel from another base, to be appointed as a defense co-counsel. In June, 1990, when Captain Koza departed for a new military assignment overseas, Captain Watson was transferred from his position as Chief of Military Justice into the Area Defense Counsel position being vacated by Captain Koza, thus becoming the sole defense counsel on the base.

Upon becoming the area defense counsel, Captain Watson recognized that there was a conflict of interest issue if he were to represent petitioner, and he approached his former supervisor, the base staff judge advocate ("SJA"), about it. The SJA is the officer with authority to waive any conflict objections on the part of the government. Based on Captain Watson's (erroneous) statements to the SJA that he had only "minimal" involvement with petitioner's case, and had never "acted for the prosecution," the SJA orally granted the requested government waiver.

After Captain Watson became area defense counsel, he became an active member of the defense team along with Captain Willner. He participated in preparation of the defense case, including taking client confidences, interviewing potential defense witnesses, investigating and collecting (and most importantly *rejecting*) potential defense evidence, and discussing strategy and tactics with Captain Willner and petitioner.

In particular, the two defense counsel discussed the anticipated issue concerning the defective "preferral" of charges by Colonel Smith. They discussed the fact that Captain Watson would almost certainly be called as a witness for the prosecution regarding his role in convincing Colonel Smith to swear to the charges. They knew this subject would arise, for they planned to call Colonel Smith as a defense witness on the merits to testify about petitioner's good military character, and about the fact that he believed petitioner would never abuse drugs. (In the military justice system, "good military character," and "specific trait" character evidence (*e.g.*, for *non*-drug abuse) are not only admissible, but may alone be sufficient to raise a reasonable doubt.) Captain Willner and Captain Watson decided that it "would look extremely poor to have somebody called from the defense counsel's table to the witness stand to testify for the prosecution." Their solution to this "problem" was to agree to a plan under which no one would learn that Captain Watson was then serving as a defense counsel. To accomplish this end, they agreed that Captain Watson would not sit at the defense table at trial (but would sit in the gallery when he was in court), and they agreed not to identify him as a defense counsel to the military judge (at the point in the trial when the defense was required by Rule for Court-Martial 901(d)(2) to identify all members of the defense.)

As planned, Captain Watson did not sit at the defense counsel table at trial. He was never introduced to the military judge and was never announced on the record or otherwise identified as a member of the trial defense team.

There was absolutely no judicial inquiry into any conflict of interest at trial, and petitioner never waived any conflict at trial.

Also as planned, Colonel Smith testified at trial for the defense that, despite swearing to and preferring the charges, he always believed petitioner was innocent. In light of this testimony, the military judge excused the court members (military jury) and held an Art. 39(a), U.C.M.J., hearing to inquire into what he and counsel for both sides agreed was a question of improper preferral of charges. Colonel Smith was recalled and testified he only signed the charge sheet because Captain Watson explained to him that it was merely an administrative command responsibility and guilt or innocence would be ruled upon in court.

Captain Watson then was called to testify for the prosecution (against petitioner's interests) about Colonel Smith's swearing to and preferral of the charges. Just before Captain Watson was called to take the stand, Captain Willner and the military judge had the following exchange:

> Captain Willner: Your Honor, before we do that, I wanted to point out to the court that since the time that these charges were preferred, Captain Watson has been reassigned to the Area Defense Counsel Office. As the Area Defense Counsel, he has worked with me in preparing for this case. He has also taken confidences from Major Haney.
>
> Military Judge: Well, fine. We won't get into his confidential relationship with the accused. We'll discuss only matters pertaining to the advice given to Colonel Smith at the time of preferral. Captain Watson?

App. C at 30a.

This is the only information that was given to the military judge that Captain Watson had worked both sides of this case. The military judge gave no indication he saw any issue of conflict or was aware of any requirement for a judicial inquiry. Despite Captain Watson's testimony for the

government in support of the legality of the preferral, the military judge found the preferral in this case to be fatally defective because Colonel Smith did not believe the charges to be true at the time he signed them. The military judge found the preferral so flawed that, unless waived by the defense, a mistrial would be necessary. Thereafter, both defense counsel (including Captain Watson, but not including any independent outside counsel), urged petitioner to waive the defective preferral and proceed with trial, which he did.

Defense counsel were unsuccessful in challenging the government's laboratory report, and called few witnesses at trial, none of whom effectively raised the issue of petitioner's extraordinary good character, including particularly his reputation—and the opinions of virtually all who knew him—that he would never use illegal drugs. The most important of the potential witnesses for this character trait were never even interviewed. Petitioner was found guilty. At the sentencing hearing which followed, counsel called no witnesses, other than petitioner who read a sworn statement. Petitioner was sentenced to an unusually severe sentence including monetary forfeitures amounting to $7000.00, seven months confinement (a substantial portion of which he served in isolation at the military's Disciplinary Barracks at Fort Leavenworth), and a dismissal from the service which will, if his conviction becomes final, terminate all military benefits including his retirement benefits.

Facts Relative to the Post-trial DuBay Hearing and Appellate Review

Petitioner three times appealed his case to the Air Force Court of Criminal Appeals ("A.F.C.C.A."),[2] and each time that court affirmed the conviction. Each time he filed a petition for review by the Court of Appeals for the Armed Forces ("C.A.A.F."),[3] and each time that court granted

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[2]The A.F.C.C.A. was formerly named the Air Force Court of Military Review.

[3] The C.A.A.F. was formerly named the Court of Military Appeals.

review. The first time, the C.A.A.F. remanded the case to the A.F.C.C.A. to consider the conflict of counsel and other ineffectiveness of counsel issues that had not been considered on that court's first review. The Air Force Court reviewed the issues and again affirmed the conviction. The second time the C.A.A.F. considered the case it not only set aside the decision of the A.F.C.C.A., but also set aside the "action" of the convening authority approving petitioner's conviction and sentence,[4] and remanded the case for submission to a different convening authority for a new staff judge advocate recommendation[5] and a new convening authority action. In so doing, the court authorized a post-trial evidentiary hearing, pursuant to *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967), to resolve the issues related to defense counsel conflict of interest, "and other ineffectiveness-of-counsel issues." *See United States v. Haney*, 45 M.J. 447, 452 (C.A.A.F. 1996), App. D. The new convening authority authorized a *DuBay* hearing, which was conducted in October 1997. None of these earlier decisions (Apps. D, E, F, or G) are at issue in this petition. It is only the post-trial *DuBay* hearing and the subsequent decisions which raise the issues addressed in this petition.

At the 1997 *DuBay* Hearing, evidence was received on both conflict of counsel and ineffective assistance of counsel issues.[6] Among the specific questions that the military judge was directed to answer was "[d]id the accused know of

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[4] At the conclusion of trial, after receiving submissions from the defense, and receiving the Recommendation of his SJA, the CA is required to take "action" on the findings and sentence, and has complete discretion to approve, disapprove or modify the findings or sentence. *See* Art. 60, UCMJ.

[5] Prior to taking action on the findings and sentence, the CA is required to receive the recommendation of his staff judge advocate. *See* Art. 60(d), U.C.M.J. The SJA is an (usually senior) attorney, and is the CA's principal legal advisor.

[6] The ineffectiveness of counsel issues raised on the record included the rejection of crucial character evidence, the failure to interview key witnesses, the failure to call available witnesses on findings, and the failure to call any witnesses other than petitioner on sentencing.

Captain Watson's prior representation of the government in his case *and did he waive this conflict of interest?*" *See* App. C at 6a (emphasis added). The *DuBay* hearing judge actually found very few facts, the majority of his "findings" being no more than a recitation of portions of the various testimony he had heard.

At the *DuBay* hearing, Captain Watson testified he did not believe there really was a conflict, and that he never obtained any written waiver from petitioner. Despite this, both Captain Watson and Captain Willner testified they "fully informed" petitioner about the conflict. Captain Willner also testified that, but for the "appearance" issue related to the defective preferral of charges, and Captain Watson potentially being a prosecution witness against petitioner, Captain Watson would have sat at the defense counsel table and been properly announced to the trial judge as defense counsel.

Petitioner testified at the *DuBay* hearing that he was never told any specifics about Captain Watson's prior government representation by either Captain Willner or Captain Watson, and that Captain Watson told him there was really no conflict because it was just a normal change of duty assignment within the military system and he had not really acted in petitioner's case.

The *DuBay* judge found there was no judicial inquiry into whether petitioner waived any potential conflict of interest with Captain Watson, or into whether petitioner waived Captain Watson's presence at trial, because "the court was never aware that Captain Watson was a detailed counsel" and "[n]o one informed the military judge that Captain Watson was also detailed as Major Haney's defense counsel." App. C at 10a, 12a. Among the facts the *DuBay* judge did find was that, after a meeting between Captain Willner, Captain Watson and petitioner in early June 1990, just prior to Captain Watson being detailed to the defense, "[n]o one saw a conflict of interest." App. C at 9a. At two separate points in his findings, the *DuBay* judge also asked the right legal question: "The issue appears to be whether a waiver requires a judicial inquiry to be

valid." *Id.* at 10a, 12a. Yet, having specifically asked the question, the military judge *did not answer it.*

The A.F.C.C.A. "adopted" the *DuBay* judge's findings of fact as its own (App. C at 6a), incorporated them into its opinion, and relied on them to resolve the conflict of interest and ineffectiveness of counsel issue. In its very brief (one page) section discussing the conflict issue, the A.F.C.C.A. found that petitioner "was aware of Captain Watson's prior participation on the government side *and knowingly waived* that participation. . . ." App. C at 30a (emphasis added). The court gave no analysis or justification in support of its naked "knowingly waived" conclusion.

Significantly, the A.F.C.C.A. also found that the military "trial judge *should have made an inquiry* into a possible conflict of interest" (App. C at 30a. (emphasis added)) after the exchange between Captain Willner and the trial judge prior to Captain Watson's testimony. The A.F.C.C.A. then declared that the *DuBay* hearing judge "found [that petitioner] clearly understood Captain Watson's potential conflict and waived it," (App. C at 30a), but gave no citation to the record for this conclusion. The court finally decided that petitioner had "failed to meet his burden to show how Captain Watson's performance was adversely affected by the perceived conflict of interest, or how it adversely affected the outcome of the trial," (App. C at 30a-31a), found no error, and affirmed the conviction.

The Court of Appeals for the Armed Forces, without comment, summarily affirmed the A.F.C.C.A. decision (App. B), and thereafter denied reconsideration of its decision. App. A.

REASONS FOR GRANTING THE WRIT

Although this Court has never determined whether the Sixth Amendment of the Constitution applies to trials conducted pursuant to the Uniform Code of Military Justice,[7]

[7] The "question of whether an accused in a court-martial has a constitutional right to counsel has been much debated and never squarely resolved." *Middendorf v. Henry*, 425 U.S. 25, 33 (1976) (footnote omitted).

virtually every military case considering the conflict of counsel issue has taken it as a "given" that the Sixth Amendment is fully applicable in this system. In law, Sixth Amendment rights are interwoven into the fabric of military justice at all levels, and have been recognized since the inception of the Uniform Code in 1950 when the principle of a conflict-free defense counsel was written into the public law in Art. 27(a)(2) of the U.C.M.J. Regarding conflict-free counsel, there is thus no justification for considering military defendants in any way different from other defendants in federal criminal cases. In fact, because of the hierarchical nature of the military personnel system, where transfers between prosecution and defense are routine, and other relational conflicts occur,[8] the appellate courts should be particularly diligent in enforcing this Court's clear constitutional norms. However, here the contrary has occurred.

In recent years, the decisions of the C.A.A.F. have slowly modified the application of this Court's conflict rules to the point where the Sixth Amendment guarantee has been effectively eviscerated. Here the accused had appointed counsel, but that counsel had an actual conflict which adversely affected his performance and the outcome of the trial, and both the post-trial *DuBay* hearing judge and the appellate tribunals utterly failed to apply proper norms to remedy a fundamental constitutional deprivation.

The A.F.C.C.A. specifically recited the information that Captain Willner gave to the trial judge about Captain Watson working both sides of the case, and found that the judge "should have made an inquiry." In every other federal (regional) circuit court of appeals applying the Sixth Amendment, under these facts, the conviction would be reversed (in most reversal would be "automatic") and a new trial ordered. Only in this "military circuit" is such a reversal

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[8] *See, e.g., United States v. Whidbee*, 28 M.J. 823 (C.G.C.M.R. 1989)(for all non-military justice duties, the defense counsel was supervised by and received performance evaluations from the "trial counsel" (in court prosecuting attorney)).

seemingly not required. Notwithstanding that the C.A.A.F. has uniformly stated that the Sixth Amendment applies in this circuit, and that it is Sixth Amendment law it applies in resolving conflicts issues, C.A.A.F. here affirmed without comment a lower court decision which completely ignored this Court's jurisprudential requirements for evaluating and deciding Sixth Amendment issues.

The conflict here is compounded by the conduct of the two appointed defense counsel in conspiring to deceive a trial judge and in facilitating the testimony by one of those counsel on behalf of the government and against his client's interest, raising a question whether in the military justice system an utterly different standard now exists both as to ineffective assistance of counsel and as to adequacy of judicial review.

The result is that "a United States court of appeals has entered a decision in conflict with the decision of [every other] United States court of appeals on the same important matter," and has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." U.S. Sup. Ct. Rule 10(a). The deprivation of such a fundamental constitutional right in conflict with the jurisprudence of every regional circuit warrants this Court's intervention.

Background Principles

The Sixth Amendment of the Constitution expressly provides that "in all criminal prosecutions, the accused shall enjoy the right. . . to be have the Assistance of Counsel for his defense." The right to effective assistance of counsel "means the right to counsel who is conflict free." *United States v. McClain*, 50 M.J. 483, 487 (C.A.A.F. 1999), citing *Cuyler v. Sullivan*, 446 U.S. 335, 345 (1980). The right to effective assistance of counsel has consistently been held to apply to military members facing trial by court-martial. *See, e.g.*, Art. 27(a)(2), U.C.M.J., 10 U.S.C. § 827(a)(2) (2000); Art.

38, U.C.M.J., 10 U.S.C. § 838; *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987).

Conflict of interest claims present mixed questions of law and fact to be reviewed de novo. *Sullivan*, 446 U.S. at 342. Ineffective assistance of counsel based on a conflict of interest is also "among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error'" and "nice calculations as to the amount of prejudice attributable to the conflict" are not to be indulged in by the court. *Holloway v. Arkansas*, 435 U.S. 475, 489 (1978)(quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)); *Sullivan*, 446 U.S. at 350 (quoting *Glasser v. United States*, 315 U.S. 60, 76 (1942)).

This Court squarely addressed the issue of conflict of interest in *Holloway* and *Sullivan*. In *Holloway*, the Court held that if the defendant or his attorney raises the issue of conflict of interest, or the trial judge otherwise knows or reasonably should know of the alleged conflict of interest, the trial judge must inquire into the potential conflict. *Holloway*, 435 U.S. at 484-491. *Sullivan* addressed the conflict question where there was no issue raised at trial. The Court held, "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Sullivan*, 446 U.S. at 348. In such a case, however, once a defendant shows his counsel had an actual conflict of interest, the conflict itself demonstrates the denial of the right to have the effective assistance of counsel and prejudice is presumed. *Sullivan*, 446 U.S. at 349.

The following year, the Court clarified *Sullivan* by noting "*Sullivan mandates* a reversal when the trial court has failed to make an inquiry even though it "knows or reasonably should know that a particular conflict exists."" *Wood v. Georgia*, 450 U.S. 261, 272 n. 18. (1981) (emphasis in original). If the *possibility* of a conflict of interest is sufficiently apparent from the record of the trial, a duty to recognize and inquire into the conflict is imposed upon the trial judge.

Wood, 450 U.S. at 272 (emphasis in original). To prevail under *Wood*, a petitioner must show (1) that the trial court failed to inquire into the conflict even though it knew or reasonably should have known about an apparent conflict, (2) that there was no valid waiver of the right to independent counsel, and (3) that counsel had an actual conflict of interest. *Wood*, 450 U.S. at 272-273. In examining the conflict claim, the court must "indulge every reasonable presumption against the waiver" of the fundamental right of effective and unimpaired assistance of counsel. *Glasser*, 315 U.S. at 70. Once a defendant makes this showing under *Wood*, prejudice is presumed, and he is entitled to reversal and a new proceeding with conflict-free counsel. *Wood*, 450 U.S. at 273-274.

Decisions of the Regional Courts of Appeals

The United States (regional) Circuit Courts of Appeals currently diverge somewhat in their legal tests related to the *Holloway/Sullivan/Wood* standard.

One group of seven Circuit Courts of Appeals employs a *Holloway/Sullivan/Wood* "automatic reversal rule" to all conflict of interest cases, even where there is no objection at trial, if the trial judge knew or reasonably should have known of the conflict and either failed to inquire or ignored the conflict. *See United States v. Levy*, 25 F.3d 146, 153 (2nd Cir. 1994); *Ciak v. United States*, 59 F.3d 296, 302 (2nd Cir. 1995); *United States v. Tatum*, 943 F.2d 370, 379-380 (4th Cir. 1991); *Riggs v. United States*, 209 F.3d 828, 832 n. 1 (6th Cir. 2000); *United States v. Cirrincione*, 780 F.2d 620, 625 (7th Cir 1985); S*ee also Spreitzer v. Peters*, 114 F.3d 1435, 1450-1452 (7th Cir. 1997); *See Dawan v. Lockhart*, 31 F.3d 718, 721 (8th Cir 1994); *See also Atley v. Ault*, 191 F.3d 865, 869-870 (8th Cir 1999); *See United States v. Crespo de Llano*, 838 F.2d 1006, 1012 (9th Cir. 1987); *United States v. Burney*, 756 F.2d 787, 791 (10th Cir. 1985).

In like manner, the highest courts in four states also employ an "automatic reversal rule" to conflict of interest cases even where there is no objection at trial, if the trial judge knew or reasonably should have known of the conflict and either failed to inquire or ignored the conflict. *State v.*

Wallace, 908 P.2d 1267, 1273 (Kan. 1995)(citing *Holloway*); *State v. Wille*, 595 So.2d 1149, 1153 (La. 1992)(citing *Holloway*); *Lettley v. State*, 746 A.2d 392, 399-400 (Md. 2000)(citing *Holloway* and *Sullivan*); *Shongutsie v. State*, 827 P.2d 361, 365 (Wyo. 1992)(citing *Holloway* and *Sullivan*).

Thus, all of these courts view a trial judge's failure in his affirmative duty to inquire into a conflict of interest to be dispositive. These courts automatically reverse and remand for a new trial with unconflicted counsel to cure this fundamental error, as they refuse to indulge in nice calculations into prejudice or adverse effect, and do indulge every reasonable presumption against the waiver of the fundamental right to conflict free counsel.

The Third Circuit Court of Appeals implies that it would use the "automatic reversal rule" of *Sullivan/Wood* if given the opportunity, but has not yet decided such a case. *United States v. Morelli*, 169 F.3d 798, 812 (3rd Cir. 1999). The Supreme Court of Connecticut also indicates it would probably use the "automatic reversal rule" if the facts warranted, but has not expressly adopted such a rule. *State v. Crespo*, 718 A.2d 925, 941 n. 27 (Conn. 1998).

The remaining circuits take a slightly different approach. They resolve conflict of interest questions by applying *Sullivan's* actual conflict/adverse effect test to all cases where there is no objection at trial (minimizing or ignoring the *Wood* clarification of *Sullivan* which required automatic reversal where the judge knew or should have known of the conflict and either failed to inquire or ignored the conflict). *See Brien v. United States*, 695 F.2d 10, 15 n.10 (1st Cir. 1982); *Familia-Consoro v. United States*, 160 F.3d 761, 764 (1st Cir. 1998); *Perillo v. Johnson*, 205 F.3d 775 (5th Cir. 2000); *Freund v. Butterworth*, 165 F.3d 839, 858-862 (11th Cir. 1999); *United States v. Taylor*, 139 F.3d 924 (D.C. Cir. 1998). These courts look at every case to ascertain whether the *Sullivan* standard of actual conflict/adverse effect has been met. At least four state high courts follow suit: *People v. Bonin*, 765 P.2d 460, 476 (Cal. 1989); *Armstrong v. People*, 701 P.2d 17, 20 (Colo. 1985); *State v. Atley*, 564 N.W.2d 817

(Iowa 1997); *State v. Mountjoy*, 708 A.2d 682, 684 (N.H. 1998). Thus, this latter group of courts always examines every conflict of interest case where the judge knew or should have known and failed to inquire under the more difficult (for the defendant) actual conflict/adverse effect standard of *Sullivan*. In any of the twelve regional circuits, petitioner would prevail and be granted a new trial.

Decisions of the Court of Appeals for the Armed Forces

In vivid contrast to the two regional circuit approaches stands the United States Court of Appeals for the Armed Forces, where there is currently no recognizable standard in regard to *Holloway/Sullivan/Wood* either when the trial judge knew or reasonably should have known of the possible conflict (and either failed to inquire or ignored the conflict) or in cases where the trial judge was not so informed. The court currently applies an inconsistent mix of incorrect legal tests in conflict of interest cases that fail to meet and uphold constitutional standards. In effect, the C.A.A.F. seems to apply a harmless error analysis.

The Court of Military Appeals (now C.A.A.F.) originally embraced a version of the *Sullivan* test in all conflict of interest cases where there was no objection at trial and the trial judge knew or reasonably should have known of the possible conflict and either failed to inquire or ignored the conflict. *See United States v. Breese*, 11 M.J. 17, 19-22 (C.M.A. 1981). In such cases, the court imposed an affirmative duty of inquiry on the trial judge and implied that a failure to inquire would require reversal. *Breese*, 11 M.J. at 20, 22-23. The court also established a rebuttable presumption "that the activity of defense counsel exhibits a conflict of interest in any case of multiple representation wherein the military judge has not conducted a suitable inquiry into a possible conflict." *Breese*, 11 M.J. at 23.

Four years later, in *United States v. Devitt*, the Court of Military Appeals explained what the *Breese* test meant in a case where the trial judge knew of the multiple representation and failed to inquire. *United States v.*

Devitt, 20 M.J. 240 (C.M.A. 1985). The court said that *Breese* established a "rebuttable presumption that an "actual conflict of interest" exists." *Devitt*, 20 M.J. at 244. The court commented that the Government could rebut the presumption by demonstrating "either that no actual conflict of interest existed under the circumstances of the case, or else that, although a conflict existed, the parties nonetheless knowingly and voluntarily chose" to waive the conflict. *Devitt*, 20 M.J. 243. The court interpreted *Wood*, *Holloway*, *Glasser* and *Sullivan* as establishing that "no way exists for the Government to carry its burden of disproving prejudice if an 'actual conflict of interest' existed." *Id.* The court saw the real question as "whether the Government can carry its burden of rebutting the presumption that there was an 'actual conflict of interest'." *Devitt*, 20 M.J. at 243-244.

Four years after *Devitt*, the Court of Military Appeals addressed another conflict of interest issue in *United States v. Sparks*, 29 M.J. 52 (C.M.A. 1989), a case raising not a multiple representation type conflict, but a switching sides scenario virtually identical to that presented in the case at bar. In *Sparks*, the court again mandated a "bright-line" rule: whenever a statutorily disqualified/conflicted defense attorney represents a military accused, without informed consent by the accused via full disclosure and inquiry by a military trial judge, the prejudice is automatic, and reversal is automatic. *Sparks*, 29 M.J. at 58.

Notwithstanding this early jurisprudence in conformity with the regional circuits, in the years since *Breese*, *Devitt* and *Sparks*, the *Holloway/Sullivan* constitutional standards have virtually disappeared from the military lexicon. In *United States v. Smith*, 44 M.J. 459 (C.A.A.F. 1996), in a 4-1 decision, the court held there was multiple representation rising to the level of an actual conflict of interest where the defense counsel had previously represented the witness who provided the pivotal evidence against the accused. *Smith*, 44 M.J. at 460-462. The court, however, found that appellant "knowingly and intelligently waived his right to conflict-free

counsel" even when the trial judge had held what the appellate court described as only a "superficial" inquiry on the record, because there was "no evidence that the conflict adversely affected counsel's representation of appellant," despite the fact that defense counsel failed to fully cross-examine and impeach his previous client about his motive to lie. *Smith*, 44 M.J. at 462, 463.

In a dissenting opinion, Judge Gierke argued that the trial judge's inquiry was inadequate under constitutional norms and that appellant's waiver was not knowing and intelligent because it was based on inadequate/incompetent legal advice from his defense counsel, who said he did not see an actual conflict but perceived only "a possible appearance." *Smith*, 44 M.J. at 462-463. Judge Gierke also focused on an underlying theme in these types of cases which is overwhelmingly evident in the case at bar: "[a] defense counsel who does not understand the problem cannot competently advise his client regarding it." *Id.*

In the most recent published opinion in this area, the Court of Appeals for the Armed Forces has completely eliminated any requirement for a *Holloway/Sullivan/Wood* inquiry and a knowing waiver at trial. In *United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998), in a 3-2 decision, the court found it "arguable" that the military judge knew or should have known of the potential conflict of interest between the defense counsel and his client, and found that the counsel with a conflict (for formerly representing a key witness for the government) "should have and could have" facilitated that judicial inquiry by merely informing the military judge of the prior representation. *Murphy*, 50 M.J. at 10. Assuming, *arguendo*, that there had been an actual conflict, the court nevertheless held that *the conflict had no impact on the merits portion* of the trial. *Murphy*, 50 M.J. at 11 (emphasis added). The court found the witness' testimony "mostly cumulative," that defense counsel did not object to the "additional facts," and that there was overwhelming evidence of guilt which meant that the witness' testimony "could not have prejudiced

appellant as to the findings of guilt." *Id.* The court even went so far as to announce it was "convinced beyond a reasonable doubt that appellant was not prejudiced by the unresolved conflict of interest because of the admission of his multiple confessions and the corroborating physical evidence." *Id.*

Amazingly, the court reached this finding on the merits even though it found that the testimony in question, which was allowed in evidence "without objection" by the conflicted defense counsel, "sealed appellant's motive for killing his own son," and "provided helpful testimony that might show why appellant would falsely confess to the killings." *Id.* By applying what seems to be a "harmless error" analysis, the C.A.A.F. has totally rejected the rationale of this Court that "nice calculations as to the amount of prejudice attributable to the conflict" are not to be indulged in by the court and that this type of infraction can never be treated as harmless. *Holloway*, 435 U.S. at 489. Notwithstanding this finding on the merits, C.A.A.F. found this very same conflict of counsel required reversal as to the sentencing portion of the trial, since it found questions of actual conflict and adverse effect still unanswered.

In *Murphy*, the C.A.A.F. effectively did away with this Court's entire jurisprudence regarding the analysis of conflict of interest. There is no *Glasser* standard, no *Holloway* standard, no *Sullivan* standard, and no *Wood* standard. There is only C.A.A.F.'s evaluation of whether the conflict error was not prejudicial "beyond a reasonable doubt" and an illogical and constitutionally infirm remedy of requiring a rehearing on sentence due to the outstanding issue of a conflict of counsel, but not requiring any remedy as to guilt based on that same conflict.

The Current Conflict

The Court of Appeals for the Armed Forces no longer espouses and enforces any discernable conflict of interest test which meets constitutional standards as enumerated by this

Court and every regional court of appeals. As demonstrated by the case at bar, the standard is so far in demise that it is now permissible for an accused to "knowingly waive" an actual, statutory, conflict of interest with no trial level waiver, and no trial level judicial inquiry even though the military judge knew or should have known of the conflict. This is true even where defense counsel testified against his client, where neither defense counsel really thought there was a conflict (though one counsel obtained an oral waiver from his former client, the government), and where both defense counsel actively misled the trial judge about the status of the accused's representation. This case is even more aggravated than a typical conflict case as it involves not just joint representation of a co-accused or representation of a witness; this case involves an active prosecutor switching sides in the middle of the prosecution to become an active defense attorney on the very same case.

In at least seven United States Circuit Courts of Appeal and four state high courts, this case would be automatically reversed as constitutionally infirm. In the remaining Circuit Courts of Appeal and at least four other state high courts, this case would be examined for actual conflict and for a determination of adverse effect pursuant to the *Sullivan* test, and would then be reversed. In stark contrast, the United States Court of Appeals for the Armed Forces found no conflict of interest problem in this case and affirmed it with neither comment nor analysis.

The decision of the United States Court of Appeals for the Armed Forces represents a complete departure from this Court's Sixth Amendment assistance of counsel/conflict of interest jurisprudence. The decision of the court below is in direct violation of *Wood v. Georgia*, *Cuyler v. Sullivan*, and *Holloway v. Arkansas*, and all the principles for which they stand. Not only does the decision of the court below fail to pass constitutional muster, but it highlights the conflict between the Court of Appeals for the Armed Forces and all the other United States Circuit Courts of Appeal on the same important matter.

CONCLUSION

Wherefore, the petitioner respectfully requests that this Honorable Court grant the petition for a writ of certiorari to the United States Court of Appeals for the Armed Forces.

Respectfully submitted,

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December 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
Washington, D.C. 20442–0001

USCA Misc. Dkt. No. 93-0157/AF
Crim. App. Dkt. No. 29000

UNITED STATES, Appellee

v.

Charles M. HANEY, Jr. (265-04-8987), Appellant

ORDER

On consideration of appellant's petition for reconsideration of the order of this Court issued on August 17, 2000, it is, by the Court, this, 12th day of September, 2000,

ORDERED:

That said petition for reconsideration is hereby denied.

For the Court,

/s/ Thomas F. Granahan
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Counsel for Appellant (BARRY, Esq.)
Counsel for Appellee (HINDEL)

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
Washington, D.C. 20442–0001

USCA Misc. Dkt. No. 93-0157/AF
Crim. App. Dkt. No. 29000

UNITED STATES, Appellee

v.

Charles M. Haney, Jr. (265-04-8987), Appellant

ORDER

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals on further review, it is, by the Court, this 17th day of August, 2000,

ORDERED:

That said petition is hereby granted; and,

That the decision of the United States Air Force Court of Criminal Appeals on further review is affirmed.

For the Court,

/s/ Thomas F. Granahan
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (BARRY, Esq.)
Appellate Government Counsel (HINDEL)

APPENDIX C

UNITED STATES AIR FORCE COURT
OF CRIMINAL APPEALS

UNITED STATES

V.

Major CHARLES M. HANEY, JR.
United States Air Force

ACM 29000 (f rev)

4 November 1999

Sentence adjudged 19 July 1990 by GCM at Peterson Air Force Base. Colorado. Military Judge: Robert N. Spencer.

Approved sentence: Dismissal, confinement for 8 months, and forfeiture of $750.00 pay per month for 12 months.

Appellate Counsel for Appellant: Mr. Kevin J. Barry, Colonel Jeanne M. Rueth, Colonel Douglas H. Kohrt, Lieutenant Colonel Ray T. Blank, Jr., Major Carol L. Hubbard, and Captain Patience E. Schermer.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Colonel Michael J. Breslin, Lieutenant Colonel Ronald A. Rodgers, and Major Bryan T. Wheeler.

Before

SENANDER, YOUNG and SPISAK
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

SENANDER, Senior Judge

The appellant was convicted, contrary to his pleas, by a general court-martial, of wrongful use of marijuana and cocaine. Article 112a, UCMJ, 10 U.S.C. § 912a. His approved

sentence is a dismissal, confinement for 8 months, and forfeiture of $750.00 pay per month for 12 months. We are reviewing this case for the third time. The appellant now assets six errors. We find no error and affirm.

I. BACKGROUND

On 15 November 1989, the appellant was randomly selected to provide a urine sample for drug testing. During the test procedures the appellant told the drug test monitor he believed his sample would come back positive because of the prescribed drugs he was taking. Subsequently, his urinalysis test report was positive for both marijuana and cocaine. The appellant has consistently denied the use of illegal drugs. He has provided different theories as to how his test results could be positive. He first speculated that the combination of prescription drugs that he took for pain resulting from a motorcycle accident might be the cause. When that theory didn't find support, he investigated his use of herbal teas, but could find no evidence to support his theory that the teas he purchased at local shops contained marijuana or cocaine.

Following his conviction by court-martial, we resolved his first appeal, alleging 10 errors, adversely to the appellant in an unpublished opinion on 26 August 1992. *United States v. Haney*, ACM 29000 (A.F.C.M.R. Aug. 26, 1992) (unpub. op.). On 6 April 1993, the substitute appellate defense counsel, in an Addendum to the Supplement to Petition for Grant of Review to the Court of Military Appeals (now United States Court of Appeals for the Armed Forces) asserted five additional errors plus an allegation of inadequacy of appellate representation. Because the Court of Military Appeals viewed the issues raised by substitute appellate defense counsel as matters that were not raised before this Court, the Court of Military Appeals set aside our prior affirmance and remanded the case to us for further review. *United States v. Haney*, 38 M.J. 229 (C.M.A. 1993). On 26 May 1994, we considered the following assignment of errors: (1) ineffective assistance of trial defense counsel; (2) an assistant to the defense team had a conflict of interest; (3) the military judge erred during instructions; (4) comments by the convening authority constituted

unlawful command influence; (5) the military judge erred in his finding a court member was not asleep during a portion of the trial; (6) the military judge was appointed in violation of the Appointments Clause; and (7) the trial and appellate judges were not appointed for fixed terms. In an unpublished opinion we found adversely to the appellant and again affirmed the findings and sentence. *United States v. Haney*, ACM 29000 (f rev) (A.F.C.M.R. May 26, 1994) (unpub. op.).

Because our superior court found that the staff judge advocate failed to serve substitute defense counsel with the first or second addenda to the staff judge advocate recommendation (SJAR), both of which raised new matter, it set aside our opinion and returned the case to the convening authority for a new SJAR and convening authority action. *United States v. Haney*, 45 M.J. 447 (1996). Our superior court also suggested that the convening authority consider an evidentiary hearing concerning Captain Watson's involvement in the trial and other ineffectiveness of counsel issues.

II. EVIDENTIARY HEARING

The 14th Air Force Commander, the new designated convening authority, ordered the evidentiary hearing and directed that it be conducted in the manner contemplated by *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). He limited the scope of the hearing to resolving Captain Watson's alleged conflict and other ineffectiveness of counsel issues. Captain (now Lieutenant Colonel) Willner, Circuit Defense Counsel, served as the detailed military counsel and Captain Watson, then Peterson Air Force Base Area Defense Counsel, acted as part of the defense team at the trial. The military judge for this post-trial Article 39(a) hearing was tasked to resolve the following questions.

a) When did Captains Willner and Watson become aware of any complaints concerning allegations of ineffectiveness-of-counsel and what were their responses?

b) What was Captain Watson's professional relationship with the accused and what services did he provide in defending the accused?

c) Who developed the initial trial strategy in defending the accused, and why was certain evidence not produced and witnesses not called? How was the accused involved in this strategy and did he consent to the defense strategy?

d) If Captain Watson was a member of the defense team, why was he not present at the initial trial? Did the accused waive Captain Watson's presence at the initial trial? Did the accused know of Captain Watson's prior representation of the government in his case and did he waive this conflict of interest?

Judge Howard R. Altschwager was detailed to preside over the hearing. He made specific findings of fact and answered the convening authority's questions in the chronological order of the events of the trial. We adopt those findings as our own. They are:

WHAT WAS CAPTAIN WATSON'S PROFESSIONAL RELATIONSHIP WITH THE ACCUSED AND WHAT SERVICES DID HE PROVIDE IN DEFENDING THE ACCUSED? DID THE ACCUSED KNOW OF CAPTAIN WATSON'S PRIOR REPRESENTATION OF THE GOVERNMENT IN HIS CASE AND DID HE WAIVE THIS CONFLICT OF INTEREST?

Captain Watson was assigned to Peterson Air Force Base, Colorado in March 1989, and became the Chief of Military Justice in July 1989. He became involved with the [appellant]'s case when he was notified by the base laboratory of the positive urinalysis results. Captain Watson described everything he did in this case for the government as "ministerial" in nature. Major Haney had security clearances that required the government to obtain permission before they could court-martial him. Captain Watson processed this request. He called the Armstrong Laboratory at Brooks Air Force Base and requested a litigation package. He asked AFOSI to check Major Haney's

records, and follow-up an old allegation that he had distributed drugs while at Hanscom Air Force Base. Massachusetts. Major Haney's defense counsel, Captain Koza. approached Captain Watson asking him to investigate a theory or thesis of Major Haney's, which Major Haney had already presented to the government. Major Haney used a TENS unit, a small device which created an electrical current to stimulate his muscles. Major Haney also took numerous prescription and over-the-counter drugs for pain, high blood pressure and other ailments. The thesis was the electric current from the, TENS unit caused his prescription and over[-]the[-]counter drugs to test positive for the marijuana and cocaine metabolites. Captain Watson said he thought the thesis was "laughable," but agreed to ask the laboratory to review the theory. The Armstrong Laboratory would not test the theory because they viewed it as being baseless.

Captain Watson testified that after he drafted the charges, he went to Major Haney's commander, Colonel Smith, and explained to him the judge advocate's recommendation that he prefer the charges. Colonel Smith was reluctant to prefer them, because he was not convinced Major Haney was guilty. Captain Watson explained to Colonel Smith that in order for him to swear to the charges, Colonel Smith had to have probable cause to believe that the offenses were committed by the accused. The question for Colonel Smith as explained by Captain Watson was whether he believed the urinalysis testing program was valid. Captain Watson then explained to Colonel Smith what he needed to do when he informed Major Haney of the charges. He told Colonel Smith that he needed to read the charges to Major Haney and then give him a copy.

Captain Watson testified that he was present at the time Colonel Smith read the charges to Major Haney.

Captain Watson said Colonel Smith introduced him to Major Haney at that time. Major Haney testified that only Colonel Smith was present when he was served with the charges. The charge sheet indicates that Colonel Smith, the accuser, preferred the charges and informed the accused of them the same day. The original record of trial is silent on the circumstances surrounding the service of charges.

I find that Major Haney was aware of Captain Watson's prior representation of the government no later than the first meeting between Captain Watson, Captain Willner and Major Haney Captain Watson's name is on the charge sheet and Major Haney admits to receiving a copy on 2 April 1990. Major Haney admits he first met with Captain Willner before meeting with both of them together, he was informed Captain Watson had just transferred from the prosecution team, and Captain Watson described his involvement with the prosecution, describing it as minimal. It is more probable that Captain Watson gave Major Haney a summary of his prior involvement with the prosecution, rather than a detailed explanation of everything he did while Chief of Military Justice. Major Haney early on viewed having a former member of the prosecution on his defense team as a distinct tactical advantage. Captain Watson told Major Haney they would have to wait and see if he could represent him.

Captain Watson researched conflict of interest cases and spoke to the base staff judge advocate about whether they would be willing to waive any potential conflict in him serving as Major Haney's defense counsel. The SJA advised Captain Watson to stay away from the case because of Major Haney's personality, but stated they would have no objections to him serving as defense counsel. Therefore, the government was aware that Captain Watson would be representing Major Haney.

Major Haney testified that Captain Watson was not present at the time Colonel Smith served a copy of the charges upon him. He said Colonel Smith did not read the charges to him, but merely handed him a copy and said he was sorry. Major Haney said the first time he met Captain Watson was in early June 1990. He said he was made aware at that time that Captain Watson had served in some role for the prosecution in his case, and he asked Captain Watson at that time if he would be a member of his defense team. He said he was not aware that the Captain Watson who swore Colonel Smith to the charges was the same Captain Watson who was now the new Area Defense Counsel (ADC). He said he first became aware of this when the military judge questioned him about a possible improper preferral at trial. I do not find Major Haney's testimony credible on this issue.

Shortly after the meeting, between Major Haney. Captain Koza, and Captain Watson. Captain Willner traveled to Peterson Air Force Base to work on Major Haney's case. Captain Willner was aware that Captain Watson had been the Chief of Military Justice and had drafted the charges, and knew from talking with Colonel Smith that Captain Watson had sworn Colonel Smith to the charges. Captain Willner recalls being told by the Chief Circuit Defense Counsel, Lt Col Woodring, to speak with Captain Watson about his involvement in the case. After doing this, Captain Willner spoke with Major Haney alone and told him about Captain Watson's involvement with the prosecution on his case. Captain Willner does not recall the specifics of what he told Major Haney. All three witnesses testified that they had a discussion about Captain Watson formerly being a member of the prosecution. No one saw a conflict of interest, and Major Haney testified he concurred.

Captain Willner spoke with the Chief Circuit Defense Counsel about what he had learned about Captain Watson's prior involvement in the case. It was both Captain Watson's and Captain Willner's understanding that Captain Watson was "detailed" to the defense team. The "detailing" was not done in writing, and it was not directly communicated to Captain Watson by Lt Col Woodring. It was clearly understood by all of the parties, including Major Haney, that Captain Willner as the Circuit Defense Counsel and more experienced counsel would be the lead counsel. Captain Watson had never prosecuted or defended a urinalysis case before, so it was not expected that he would have any active role at the defense table during the trial.

There was no judicial inquiry into whether Major Haney waived any potential conflict with Captain Watson, because the court was never aware that Captain Watson was a detailed counsel. The record discloses that Captain Koza was reported as the original detailed counsel, and Major Haney waived any further participation by him. I find that there is sufficient evidence to show Major Haney was fully informed of his right to conflict free counsel by his trial defense counsel. The issue appears to be whether a waiver requires a judicial inquiry to be valid.

Captain Watson's role was to be a local contact point for Major Haney, Captain Willner, and local witnesses. Prior to trial, Captain Watson solicited and collected written witness statements. He interviewed witnesses with Captain Willner, but does not recall interviewing any witnesses by himself. He discussed trial strategies with Captain Willner and Major Haney, Captain Watson, Captain Willner and Major Haney all testified that they had numerous discussions about the trial tactics and strategy.

One of the defense theories investigated before trial was whether different teas that Major Haney drank

contained ingredients that would result in positive urinalysis test results for marijuana and/or cocaine. Captain Watson was primarily responsible for investigating this theory. Captain Watson told Major Haney to bring him any teas he had left over, but Major Haney told him he had already disposed of them. Major Haney testified he threw them away in December at the suggestion of a superior officer. They both went to the stores where he had purchased the teas. Two of the stores were now closed. Major Haney could not remember the names of the teas and they could not find them on the store shelves. Major Haney told him he also bought tea in bulk. Captain Watson spoke to the store owners to see if he could identify the supplier. He contacted two of the companies and was told they have botanists on their staffs who do quality control testing to ensure the teas do not contain any illegal substances. Major Haney's recollection was that they spent several days trying to find the teas, but was told that the suppliers and source of the tea change constantly.

WHY WAS CAPTAIN WATSON NOT PRESENT AT THE INITIAL TRIAL, AND DID THE ACCUSED WAIVE CAPTAIN WATSON'S PRESENCE AT THE INITIAL TRIAL?

Major Haney testified that the first he knew that Captain Watson would not be present at the defense table as a member of the defense team during the trial was the morning of trial. He said both defense counsel told him it would be better if Captain Watson was not present in court. He said they said it would be easier for Captain Watson to retrieve documents, and there was no plan for Captain Watson to question any of the witnesses. Major Haney concurred with the advice not to have Captain Watson in the court room.

Both Captain Watson and Captain Willner have a very different memory of when the question of

whether Captain Watson should be present in court was discussed with Major Haney. Both say this discussion first occurred early, shortly after Captain Watson joined the defense team, and well before the first day of trial. They explained to Major Haney that because Captain Watson had no experience in urinalysis cases, he could not question any witnesses. Captain Willner had already interviewed Colonel Smith, and knew he would be a strong witness for the defense. Captain Willner believed that the trial counsel would attack Colonel Smith's strong opinion of Major Haney by asking him why he preferred the charges, and the defense counsel were afraid he would point to Captain Watson and say he did it upon the advice of Captain Watson. The effect of the court members wondering about a defense counsel advising a commander that there was probable cause to believe the accused committed the offenses would greatly undermine the impact of his testimony. Defense counsel say they explained all of this to Major Haney well before trial, and he concurred in the strategy. The more credible evidence supports a knowing waiver of Captain Watson's presence by Major Haney, however, the question remains whether a judicial inquiry was also required. Captain Willner at the beginning of the trial told the military judge that Captain Koza was "the original detailed defense counsel." No one informed the military judge that Captain Watson was also detailed as Major Haney's defense counsel.

Captain Watson consulted with Captain Willner and Major Haney during the recesses and discussed trial strategy issues with them. When the military judge raised the issue of the possibility of a defective preferral, both attorneys were involved in discussing Major Haney's options with him during the recess. Major Haney testified that this discussion was the first time they had informed him about the possibility

of a defective preferral. Major Haney said he did not know until then that Captain Watson, his defense counsel, was the same Captain Watson who had sworn Colonel Smith to the charges. He said his attorneys told him they were fortunate that Colonel Smith had blurted out that he did not believe Major Haney was guilty. He said they told him there was no way he would now be convicted, even though the military judge had instructed the members to disregard the statement. Major Haney said if the military judge had asked him whether he wanted to proceed at that time and waive the issue, he would have said yes. Major Haney was asked this question by the military judge at pages 264-266 of the record of trial, he stated he discussed the issue with his counsel, and waived any issue related to a defective preferral of charges.

Captain Willner said he recognized defective preferral as a potential issue after he interviewed Colonel Smith prior to trial. He recalls discussing this issue with Major Haney, both before the trial and during the recess after the issue was raised at trial by the military judge. Captain Watson was present during the discussion at trial, and Major Haney also discussed the issue with Captain Hedgepeth during the same recess. Captain Hedgepeth was an Air Force Judge Advocate who testified as a character witness for Major Haney. Both Captain Willner and Captain Watson recall telling Major Haney the result of asserting that the preferral was defective was that he would gain a short delay in the trial. The charges would be preferred and referred to trial again, but would be tried before a different court panel. The disadvantages discussed were that the government would now have a better insight into the defense case. The defense would also lose the effect of the members hearing Major Haney's commander state he did not believe he was guilty, even though he preferred the

charges. The government would most likely have someone else prefer the charges, and would move ahead of time to limit Colonel Smith or any other witness expressing an opinion as to guilt or innocence of Major Haney. Both counsel testified that after discussing the issue with Major Haney, he agreed to waive the issue and pursue this strategy.

WHO DEVELOPED THE INITIAL TRIAL STRATEGY IN DEFENDING THE ACCUSED, AND WHY WAS CERTAIN EVIDENCE NOT PRODUCED AND WITNESSES CALLED? HOW WAS THE ACCUSED INVOLVED IN THIS STRATEGY AND DID HE CONSENT TO THE DEFENSE STRATEGY?

Captain Willner as the lead defense counsel was primarily responsible for developing the trial strategy. Captain Willner discussed all of the strategies with Major Haney and Captain Watson both before and during the trial. Both defense counsel described Major Haney as the most active client either of them ever had in discussing strategies to be used in his defense.

The first defense theory was one created by Major Haney before Captain Willner or Watson ever became involved in the case. Major Haney had put together what he called a thesis and had given it to the government. It is unclear whether this was done with the knowledge and consent of his first defense counsel Captain Koza. Captain Watson had been asked by Captain Koza to explore this thesis for the defense in January 1990. Captain Watson forwarded the request to the Armstrong Laboratory, but they refused to explore the theory, saying it was not scientifically possible. When Captain Willner was assigned to the case, he asked Major Haney who would support this thesis. Major Haney gave him some names, but when Captain Willner talked with them they either were not competent to testify about

the theory, or if competent, did not believe the theory to be true. Major Haney gave him the name of Hauser Labs who were associated with the University of Colorado in Boulder, Colorado. Major Haney had already hired them to explore his theory, and told Captain Willner that they supported his theory. Captain Willner reviewed the written report and discovered the lab did not support Major Haney's thesis. Captain Willner spoke to the chemist who had performed the tests. He told him the electrical current from the TENS unit would not coalesce into the metabolites for marijuana and cocaine. He also told Captain Willner that he had told Major Haney the lab could not support his theory. Captain Willner contacted experts in forensic toxicology that he was familiar with, and could find no one to support the theory. Captain Willner made a motion at trial to prevent the government from making any reference to this thesis of Major Haney's, but lost the motion. A variation of this theory was an unknowing and innocent ingestion defense. The theory was the teas used by Major Haney contained substances which unknown to him caused him to test positive for cocaine and/or marijuana. The steps taken to explore this theory have been previously discussed.

A second strategy that was explored was to attack the accuracy of the Armstrong Laboratory results by comparing them to the toxicology screen results from Major Haney's blood. Major Haney had had surgery on 20 November 1989, five days after submitting his urine specimen, which tested positive for cocaine and marijuana. Captain Willner spoke with Major Haney's physician who told him the blood toxicology screen used before surgery does not have the same sensitivity as the Armstrong Laboratory test. He told Captain Willner he would not expect to see evidence of marijuana or cocaine in the blood toxicology screen unless the patient had used the drugs between 15 and 20 November 1989. Captain

Willner determined that this had no evidentiary value to the defense. He does not recall if he reviewed the medical records or asked to see them once he found out that they would be of no value.

A third strategy that was explored was the theory that Major Haney could not have used cocaine and marijuana during the changed time period because he was always being observed by other people, none of whom saw him under the influence of any drug. During the charged time period, Major Haney was involved with others in testing the capabilities of the Global Positioning Satellite (GPS) network. He was working long hours and was called in at irregular times. He was required to perform complex tasks at work. The defense explored this theory and presented evidence to support it. They called Major Martel at trial to testify about Major Haney's busy schedule, irregular hours, and complex tasks required to be performed by him. The defense has criticized the trial defense counsel for not calling witnesses who also observed Major Haney during his off-duty time, specifically Lt Col Roe and Major Haney's wife. Lt Col Roe submitted a statement before trial to trial defense counsel telling them he and his wife had dinner and spent most of the day with Major Haney and his wife on 7 November 1989. Lt Col Roe testified at the DuBay hearing that he just recently has recognized that the date he spent with Major Haney and his wife was not 7 November 1989, but 12 November 1989. This change in the date is significant given the testimony of the forensic toxicologist at trial about the retention time for cocaine in the urine. The date given to trial defense counsel was well beyond the time period where observation of Major Haney in a social setting had any evidentiary value to rebut the charge of use of cocaine. Additionally, the error in reporting the date of the dinner party was never noticed by Lt Col Roe

until recently, and the error in the date was never reported to trial defense counsel.

A corollary to this strategy was to have Major Haney testify in his defense and deny his use of marijuana and cocaine, as well as outline his activities during the charged time period. Major Haney alleges that his trial defense counsel did not prepare him for his testimony until the morning before trial, and their preparation was cursory. Captain Willner testified that he prepared Major Haney for testifying well before trial. He discussed the line of questioning he would pursue. He told him some of the specific questions he would ask, and elicited Major Haney's responses. He also told him other areas he would cover in his questioning, without telling him the specific questions he would ask. He told him how he should conduct himself in court, his demeanor, and to address his responses to the court members. He told Major Haney to unconditionally deny his use of drugs. He did not tell him to qualify his denial by saying "I did not use them at that time."

Captain Willner and Captain Watson spoke with Mrs. Haney a number of times before trial, as well as after trial. Mrs. Haney testified the first time they spoke to her was just two days before trial, a statement both counsel deny as being true. Mrs. Haney said trial defense counsel told her two days before trial that her husband was going to be convicted and go to jail for 7 years. Trial defense counsel deny they said this, however, they did discuss with her the possibilities of what could occur. Captain Willner did not call her as a witness because the disadvantages of calling her as a witness outweighed any advantage in calling her. Mrs. Haney had medical problems that were beginning to be resolved just before trial. Mrs. Haney was also very emotional. Major Haney told Captain Willner that he was not able to be honest with his wife concerning aspects of the trial. Captain

Willner was concerned that if she testified she would antagonize the court members because she appeared to have a big chip on her shoulder about the Air Force. Major Haney and Mrs. Haney had met and married while both were Air Force enlisted members. When Major Haney was commissioned, she believed that she had been forced to get out of the Air Force after serving over eight years, thus giving up her right to her own retirement. Mrs. Haney appeared to be very bitter about this, and Captain Willner was concerned she would come across this way. What Mrs. Haney could testify about during findings was that they had been very busy the two weeks before 15 November 1989, because they both had busy jobs and were also meeting with realtors to try and sell their house. Captain Willner also felt that court members gave less weight to the testimony of a spouse than other witnesses, because next to an accused, she had more to lose than anyone else. Captain Willner talked about these issues with Major Haney and he agreed to this strategy.

A fourth strategy explored by the trial defense counsel, and one they intended on using until two weeks before trial, was the theory that the urine specimen that tested positive either was not Major Haney's or the specimen had been adulterated. Major Haney had a long history of taking prescription pain medications. If the urine specimen which tested positive for cocaine and marijuana metabolities was his, or was not adulterated, the metabolities for the prescription drugs should be found in the correct ratio to when he would take these drugs. If the urine specimen was not his, none of his prescription drugs would be found in the specimen, or if found in lower than expected ratios, would show that the urine had been diluted or adulterated. The trial defense counsel got the name

of Dr. Levisky from either Major Haney or someone Captain Willner had spoken to about the TENS thesis. Dr. Levisky was a toxicologist for the El Paso County medical examiners office and was an officer in the Air Force Reserves. Dr. Levisky agreed to help the defense for free on his own time. This meant that the defense did not have to notify the government of Dr. Levisky until they decided they were going to call him as a witness, and did not have to request funding for the testing from the convening authority. However, to test this theory, they had to request an aliquot of the urine.

Dr. Levisky tested the aliquot for the cocaine and marijuana metabolities and found them in the same ratios as the Armstrong Laboratory and Northwest Toxicology Laboratory. He then tested for the presence of one or two of the medications being taken by Major Haney. He found both of them present, but at levels lower than expected. This supported the defense theory that Major Haney's sample had been adulterated by someone pouring into his specimen some person[']s urine which contained the metabolities for cocaine and marijuana. Two weeks before trial, Dr. Levisky on his own initiative, examined the aliquot for the presence of Theopholine, another drug commonly taken by Major Haney. He found the Theopholine in the ratio he expected. The most likely explanation that Dr. Levisky had was that this was Major Haney's urine, but he had not taken his prescription medications at either the time or in the quantity required by the prescription. Captain Willner explained the damage that would be caused to the defense case by presenting evidence that conclusively identified this as Major Haney's urine. Major Haney wanted to present this defense, but in the end, agreed that it made no sense to positively identify this as his urine. Captain Willner and Dr. Levisky thought as a corollary to this theory,

they would have a physician review Major Haney's medical records to see if there was any medical reason why he would secrete lower levels of the other drugs. Dr. Bowerman with the medical examiners office in El Paso County reviewed the records and found no reason why Major Haney would secrete lower levels. He also told Captain Willner that Major Haney fit the profile of a drug user and he thought Major Haney used the marijuana and cocaine.

A fifth strategy explored and used by the trial defense counsel was the good military character of Major Haney. Both trial defense counsel requested Major Haney to contact potential character witnesses and ask them to draft character statements. Captain Willner does not recall whether he gave Major Haney or potential character witnesses any specific guidance, either orally or in writing, about what to include in the character statements. Captain Watson identified certain parameters, such as not to say "he did not do it" or "he passed a polygraph," because neither was admissible and the second was not true. The character statements came to Captain Watson either directly or through Major Haney to review and edit. Captain Watson edited the witness statements as they came in, but not all came back in time to be re-submitted after they had been edited. Captain Watson believed it was important that the character statements admitted into evidence not have any obvious editing gaps. Trial defense counsel do not remember if everyone who submitted a statement was interviewed as a potential witness. Captain Willner interviewed potential witnesses, and often times Captain Watson was present. Captain Watson does not recall interviewing any witnesses by himself. Trial defense counsel talked about which witnesses to call both among themselves and with Major Haney. They wanted to present those they

thought would be most credible and who covered different time periods. Trial defense counsel knew that the military judge would place a limit on the number of witnesses they could call on this issue. They decided after a certain point, it would be counter-productive to have repetitive testimony. The court members would begin to resent it, and the weaker witnesses would dilute the testimony of the stronger witnesses. The trial defense counsel discussed with Major Haney the witnesses they proposed on calling and the reasons for their decision. Neither recalls any objections to Captain Willner's choices by Major Haney.

Hearing exhibits 30 and 31 look like the lists of potential witnesses provided by Major Haney to Captain Willner. Captain Willner has no recollection as to who or how many of the witnesses he interviewed, but believes he interviewed most. Some of the interviews were by phone, but most were in person. Major Haney did not tell him the number next to the name on exhibits 30 and 31 were the desired order in which witnesses be called. Captain Willner met and spoke with each person that he called as a defense witness before trial. He does not remember how long he spoke with each one. He did not rehearse specific questions and answers with them, but instead discussed the topic areas he would ask questions about on direct examination, and what questions they could anticipate on cross-examination.

Captain Willner testified that he attempted to help Major Haney prepare an unsworn statement prior to trial. Major Haney refused to prepare it, and told Captain Willner it was inconceivable that he would be convicted. After he was convicted, he once again told Major Haney to prepare the statement. The next morning they reviewed the statement before trial. The defense did not call any witnesses in sentencing because all of the good character evidence had already

been introduced during findings. The defense did introduce defense exhibits CC and DD. The problem for the defense was the members by convicting Major Haney showed they did not believe his testimony during findings. The defense had multiple character statements and testimony already before the members and it could be used by the members in sentencing as well. They chose not to call witnesses from his unit to testify about his rehabilitative potential because they had already presented their strongest witnesses and the members would view this as more of the same evidence they had already heard in findings. The defense was also concerned about the cross-examination they would experience about the rehabilitative potential of a major convicted of drug offenses. The defense did present to the members information about Major Haney's medical problems and support for his mother through his unsworn statement. They did not present independent medical evidence because Major Haney's doctors did not view his medical problems as being as serious as Major Haney did.

After the trial, both trial defense counsel were involved in preparing clemency matters. They had read all of the letters submitted before trial, and chose to use some and not others. Some were not used at trial because they contained potentially objectionable material and the edited statements were not returned in time for use at trial. Other statements were used only during clemency because they contained either potentially negative information, did not add anything, or the court members could become irritated by their contents.

WHEN DID CAPTAINS WILLNER AND WATSON BECOME AWARE OF ANY COMPLAINTS CONCERNING ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL AND WHAT WERE THEIR RESPONSES?

Major Haney's first post-trial complaint is that he was not prepared to immediately go into confinement once he was sentenced to confinement. He said he was unaware that he would not be able to go back and gather his things together. Captain Watson said this was a detail he would have his defense paralegal instruct the client on, including giving them a handout of what to pack for confinement. In my opinion, there is a probability that this information was not passed on to Major Haney. Major Haney was Captain Watson's first defense client, his first officer client, and one of his first courts-martial as a defense counsel. Major Haney did not believe he would be convicted. There is a low likelihood that he would have been receptive to any information about sentencing or post-trial matters from the defense paralegal, let alone his own attorneys.

Captain Willner as the defense counsel of record was responsible for all post-trial duties. Captain Watson assisted him by being a contact point for Major and Mrs. Haney, and received all matters to be submitted in clemency. Major Haney said he tried contacting Captain Watson 20 to 30 times between the time he was convicted and the time he let anyone officially know he was dissatisfied with his defense counsel. He said he was only successful in contacting him about a dozen times. He said he wanted Captain Watson to give him more information about his prior role for the government in his case, his post-trial rights, and assistance to his wife to explain to her what was going on. Captain Willner was much harder to contact. Captain Watson was very active in gathering clemency matters for Major Haney.

Captain Willner was first aware of Major Haney having potential concerns about the performance of military trial defense counsel before the trial. Captain Willner was aware that Major Haney's wife and friends were advising him to obtain civilian

counsel. Captain Willner spoke with Bob Warren, a civilian attorney contacted by Major Haney before trial, and answered his questions about the case. Captain Willner was contacted by two other civilian defense counsel after the trial sometime before Captain Willner submitted his R.C.M. 1105 and 1106 materials. Captain Willner had also heard that Major Haney was making complaints to the jail staff about his attorneys. Captain Willner spoke to the Chief Circuit Defense Counsel about this, and he was advised to talk to Major Haney about any dissatisfaction he had with them. Captain Willner spoke with Major Haney and told him he had to feel completely comfortable with his defense counsel, and if he was unhappy he needed to release them and get new counsel. Major Haney denied the allegations from the jail staff that he was unhappy with his trial defense counsel, and he said he was satisfied with their performance. This conversation took place before Captain Willner submitted his R.C.M. 1105 and 1106 materials.

Captain Willner submitted the defense clemency matters to the convening authority on 4 October 1990. Captain Willner submitted his R.C.M. 1105 and 1106 matters to the convening authority on 23 October 1990. Major Haney's undated request for clemency, which is Hearing Exhibit 34, was submitted with Captain Willner's clemency materials on 4 October 1990. Hearing Exhibit 35, dated November 16, 1990, says in paragraph 2a that both of his trial defense counsel quit on 23 October 1990. However, the testimony of both trial defense counsel and Major Haney is that Hearing Exhibit 33, dated 25 October 1990, is the first notice either the convening authority or either trial defense counsel had that Major Haney was dissatisfied with his trial defense counsel or that he was alleging ineffective assistance [of] counsel. Major and Mrs. Haney

testified that they had been working on a draft of Hearing Exhibit 33 for several weeks, but they had not shared their concerns or a draft with anyone else, including their trial defense counsel. Major Haney gave Mrs. Haney what is now Hearing Exhibit 33 on 25 October 1990 to hand deliver to the convening authority, which she did on the same date. Captain Watson had never been identified in the record as an attorney of record, so there never was any formal release of him by Major Haney or the court. Captain Willner was formally released by the court at the post-trial Article 39(a) on 31 October 1990.

III. ERRORS BY THE MILITARY JUDGE DURING EVIDENTIARY HEARING

The appellant in his first assignment of error asserts the military judge erred by (1) failing to evaluate the credibility of the witnesses and evidence; (2) failing to make findings of fact and conclusions of law; and (3) failing to reopen the hearing to allow defense cross-examination of a prosecution witness after discovery of new evidence during the hearing. He asserts these errors substantially prejudiced him and rendered the *DuBay* hearing incomplete, fundamentally unfair, and fatally flawed.

A military judge in a post-trial hearing has the burden of providing a record on which the convening authority and appellate courts can reach a decision on the merits of an appellant's claims. We expect the military judge, when necessary, to subject witnesses to penetrating questioning so that he can determine their credibility, reconcile inconsistencies in the testimony, and find facts. *United States v. Calamita*, 48 M.J. 917 (A.F. Ct. Crim. App. 1998). That is precisely what Judge Altschwager did in this case. He conducted a thorough hearing and analysis of the credibility of the witness testimony. His comprehensive findings of fact both answered the questions posed by the convening authority and created a thorough record on which we can rely to resolve conflict of interest and ineffectiveness of counsel issues.

The appellant further asserted that he was prejudiced by the military judge's decision not to reopen the hearing for cross-examination of Lieutenant Colonel (Lt Col) Willner. Prior to the hearing the assistant trial counsel asked Lt Col Willner to provide the government and defense counsel any notes he made during his representation of the appellant. However, Lt Col Willner had recently moved and did not have the notes available. He brought them with him to the hearing. The appellant's counsel was mistakenly told there were no notes because that is what the assistant trial counsel understood. The parties became aware of the notes during cross-examination of Lt Col Willner. After assuring that the appellant waived any privilege he may have had concerning his defense counsel's notes, the hearing officer granted a recess to enable counsel to review the notes. The hearing officer announced, after the 37 minute recess, that he had been informed that the defense was prepared to continue their cross-examination, but wanted some time to review the trial defense counsel's notes to determine if it would be necessary to reconvene at a later date or if they could emphasize the points they wished to make by written brief. The cross-examination of Lt Col Willner continued and the hearing was concluded subject to the defense requesting it be reopened.

Three weeks later the appellant requested the hearing be reopened to continue cross-examination of Lt Col Willner based on a review of his file. The hearing officer denied the request to reopen after determining that all of the areas that the defense requested to reexamine were covered during Lt Col Willner's testimony. The hearing officer's report discussed this matter as follows:

> Specifically, Lt Col Willner testified with his case file on his lap so that it was available to jog his memory. Lt Col Willner testified on each of the areas requested by defense counsel and said even though he had reviewed the file, he had no further recollection of each of these areas of inquiry. Further inquiry by the defense counsel, with specific

references to his notes, was highly unlikely to result in more detailed answers.

We review a military judge's denial of a defense request to produce a witness under an abuse of discretion standard. *United States v. Miller*, 47 M.J. 352, 359 (1997). Testimony of a witness is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. The appellant conducted extensive cross-examination of Lt Col Willner and the military judge did not abuse his discretion when he determined that reconvening the hearing for further cross-examination would not be productive. Mil. R. Evid. 611 (b). The appellant's assertion that the *DuBay* hearing was incomplete, fundamentally unfair, and fatally flawed is without merit.

IV. DEFECTIVE STAFF JUDGE ADVOCATE RECOMMENDATION AND CONVENING AUTHORITY ACTION

The appellant asserts the new SJAR and addendum are defective and void because they (1) are based on conclusions drawn from a fatally flawed *DuBay* hearing which failed to adequately address crucial issues in the case, including the questions set forth in the convening order, and (2) are made in a vacuum, without the benefit of any counsel by the staff judge advocate.

The appellant concludes the *DuBay* hearing was fatally flawed because he believes the military judge did not answer two questions: (1) whether the appellant waived Captain Watson's presence at the trial, and (2) whether the appellant knew of Captain Watson's prior participation on the government side and waived any conflict. We disagree. The hearing officer's findings of fact, which are set out above, fully answer each of these questions. Based on all of the testimony it is clear that Major Haney wanted the benefit of having Captain Watson assisting in his defense. Captain Watson was careful to ensure there was no conflict of interest. The *DuBay* hearing brought out all of the essential facts and is not fatally flawed as claimed by the appellant.

The appellant next complains because the staff judge advocate did not include legal arguments, justifications, or other discussion of the issues in the new SJAR or addendum. However, the staff judge advocate is only required to state whether corrective action on the findings or sentence should be taken when an allegation of legal error is raised in matters submitted under Rule for Courts-Martial (R.C.M.) 1106(d)(4). The response may consist of a statement of agreement or disagreement with the matters raised by the accused. An analysis or rationale for the staff judge advocate's statement, if any, concerning legal errors is not required. R.C.M. 1106(d)(4). The SJAR and the convening authority action are not defective. The convening authority had all of the evidence and legal advice necessary to take action. R.C.M. 1107(b)(3). This issue has no merit.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

The appellant has again asserted ineffective assistance of counsel. Although this Court has twice ruled on this issue, we will once again examine it in light of the evidence obtained during the *DuBay* hearing. Appellant apparently has now narrowed his assertion of ineffective assistance of counsel to trial defense counsel's presentation of evidence on good military character.

To prevail on a claim of ineffective assistance of counsel, an appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Strategic or tactical decisions made by a trial defense counsel will not be second-guessed on appeal unless there was no reasonable or plausible basis for the defense counsel's actions. *United States v. Garries*, 19 M.J. 845 (A.F.C.M.R. 1985), *aff'd*, 22 M.J. 288 (C.M.A. 1986), *cert. denied*, 479 U.S. 985 (1986). *See United States v. Mansfield*, 24 M.J. 611 (A.F.C.M.R. 1987). A strategic decision by defense counsel may constitute ineffective assistance of counsel only if it was so patently unreasonable that no competent attorney would have made the same

decision. *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983). The reasonableness of a counsel's tactical decisions is determined by examining the facts at trial and the circumstances under which counsel's decision was made. *Mansfield*, 24 M.J. at 617.

Lt Col Willner explained that he limited the number of witnesses to call on good military character and presented the remaining evidence in statement form. He was aware that the military judge would not allow an unlimited number of witnesses and he consulted with the appellant and called those he believed would be most credible and who would cover different time periods. Lt Col Willner believed it would be counter-productive to have repetitive testimony and the members would resent it. The character statements that were presented were edited so as to show the appellant's good military character. The trial defense counsel had the statements redone to avoid having obvious editing gaps because many of the witnesses referred to never seeing the appellant use drugs. Evidence that witnesses had never seen or known the accused to use drugs was not admissible as evidence of a character trait. *United States v. Schelkle*, 47 M.J. 110 (1997), *cert. denied*, 522 U.S. 1078 (1998). Trial defense counsel had a sound tactical reason for editing the statements and we will not second-guess the editing or presentation of these statements. Trial defense counsel's performance was not deficient. This claim of ineffective assistance of counsel is without merit.

VI. CONFLICT OF INTEREST

Once again the appellant asserts he was denied due process of law and the effective assistance of counsel when Captain Watson swore his commander to the charges during the preferral process and then switched sides becoming the area defense counsel and eventually assisting appellant in the preparation of his case.

When an alleged conflict of interest is at issue, "a defendant who raised no objection at trial must demonstrate

that an actual conflict of interest adversely affected his laywer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980), *quoted in United States v. Breese*, 11 M.J. 17, 20 (C.M.A. 1981). The burden of proof is on the defense. *United States v. Hicks*. ____ M.J. ____ No. 97-0432/AR (Sep. 30, 1999); *United States v. Calhoun*, 49 M.J. 485, 489 (1998) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

We find that the appellant was aware of Captain Watson's prior participation on the government side and knowingly waived that participation because he believed there would be an advantage to having Captain Watson on his defense team. Captain Watson took all appropriate steps to be released by the staff judge advocate. The facts developed during the *DuBay* hearing demonstrate that he was equally careful to properly inform the appellant so he could make a knowing waiver of any conflict of interest based on Captain Watson's prior participation on the prosecution team.

During the course of the trial an issue arose as to proper preferral of charges by Colonel Smith. An Article 39(a), UCMJ, session was held and Captain Watson was called to testify. Captain Willner stated to the court:

> IMC: Your Honor, before we do that, I wanted to point out to the court that since the time that these charges were preferred, Captain Watson has been reassigned to the Area Defense Counsel Office. As the Area Defense Counsel, he has worked with me in preparing for this case. He has also taken confidences from Major Haney.
>
> MJ: Well, fine. We won't get into his confidential relationship with the accused. We'll discuss only matters pertaining to the advice given to Colonel Smith at the time of preferral. Captain Watson?

Under these circumstances the trial judge should have made inquiry into a possible conflict of interest. Regardless, as Judge Altschwager found after the post-trial evidentiary hearing, the appellant clearly understood Captain Watson's potential conflict and waived it. Furthermore, the appellant

failed to meet his burden to show how Captain Watson's performance was adversely affected by the perceived conflict of interest, or how it adversely affected the outcome of his trial. This asserted error is without merit.

VII. INATTENTIVE COURT MEMBER

The appellant asserts that he was denied his right to counsel, due process, and a fair trial during the post-trial Article 39(a) session conducted by the military judge to resolve allegations that a court member was inattentive or asleep.

At the post-trial Article 39(a) session the military judge asked Captain Willner, who no longer was counsel for the appellant, what he had observed during the trial. Captain Willner had a duty to truthfully answer questions concerning his observations in the courtroom. His answers neither constitute a conflict of interest nor a violation of the attorney-client privilege. The military judge was not precluded from conducting this post-trial session any more than he would have been precluded from making inquiry concerning an inattentive court member during the trial. We find no basis for changing our previous opinion that the asserted error is without merit.

VIII. APPELLATE REVIEW UNDER ARTICLE 66(c), UCMJ

The appellant requests that we perform a plenary review of his case and not limit our review to the specific issues. Typically, action can only be taken that conforms to the limitations of the remand. *United States v. Smith*, 41 M.J. 385, 386 (1995). However, an appellate court may consider closely related issues(s) where the record is adequately developed. *United States v. Jordan*, 38 M.J. 346, 353 (C.M.A. 1993) (Wiss, J., dissenting). In this case, we disagree with the appellant that a complete review of this case was required. Nevertheless, we have considered the entire record, including the post trial Article 39(a), UCMJ, session record and the record of the post-trial evidentiary hearing.

IX. CONCLUSION

We conclude the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings and sentence are

AFFIRMED.

Senior Judge YOUNG and Judge SPISAK concur.

LAURA L. GREEN
Clerk of Court

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

United States, Appellant

v.

Charles M. HANEY, Jr., Major,
U. S. Air Force, Appellee

No. 93-0157

45 M.J. 447; 1996 CAAF LEXIS 118

November 1, 1995, Argued

December 17, 1996, Decided

PRIOR HISTORY: CMR No. 29000. Military Judge: Robert N. Spencer.

CORE TERMS: defense counsel, addendum, convening, post-trial, recommendation, new matter, sleeping, military, clemency, staff, confidence, sub-issue, defense team, session, salted, ineffective assistance of counsel, attachments, substitute counsel, failure to serve, new issue, court-martial, sentence, new trial, own work, involvement, prosecutor, invalidate, appearance, questioned, profferal

COUNSEL: For Appellant: Kevin J. Barry (argued); Lieutenant Colonel Joseph L. Heimann (on brief).

For Appellee: Major LeEllen Coacher (argued); Colonel Joseph L. Heimann and Lieutenant Colonel Michael J. Breslin (on brief).

Amicus Curiae: Captain Norman R. Zamboni; Colonel Stephen D. Smith, Lieutenant Colonel John T. Rucker, and Major Roy H. Hewitt (on brief).

JUDGES: EVERETT, Senior Judge. Judge SULLIVAN concurs. COX, Chief Judge (concurring). GIERKE, Judge (concurring in part and in the result). CRAWFORD, Judge (dissenting).

OPINION BY: EVERETT

OPINION:

Opinion of the Court

EVERETT, Senior Judge:

Appellant was tried by a general court-martial composed of officer members at Peterson Air Force Base, Colorado, on July 19, 1990. Contrary to his pleas, the members found appellant guilty of one specification each of use of marijuana and cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. He was sentenced to dismissal, confinement for 8 months, and forfeiture of $ 750.00 per month for 12 months. After a post-trial session under Article 39(a), UCMJ, 10 USC § 839(a), had addressed—and found no merit in—allegations that a member was sleeping during the trial, the convening authority approved the sentence. In August 1992, the Court of Military Review[1] affirmed the findings and sentence in an unpublished decision.

In our initial review of this case, we set aside the decision below and remanded it for consideration of new issues raised initially before this Court. 38 M.J. 229 (1993). In May 1994, the court below, in another unpublished opinion, reaffirmed the findings and sentence. Appellant again petitioned this Court, and we granted review of this issue:

WHETHER THE CONVENING AUTHORITY ACTION WAS DEFECTIVE AND VOID, WHERE THE CONVENING AUTHORITY WAS ON NOTICE THAT APPELLANT WAS NOT REPRESENTED BY CONFLICT-FREE COUNSEL, DURING MUCH OF THE POST-TRIAL PHASES OF THE TRIAL, AND WHERE THE STAFF JUDGE ADVOCATE RECOMMENDATION AND SUBSEQUENT ADDENDA WERE NEVER SERVED ON APPELLANT'S (CONFLICT FREE) SUBSTITUTE DETAILED DEFENSE COUNSEL WHO HAD BEEN APPOINTED TO REPRESENT APPELLANT AT THE POST-TRIAL 39(a) SESSION.

This granted issue involves questions regarding the satisfactory service of the initial staff judge advocate's (SJA) recommendation on the original defense counsel and the service of two addenda to this recommendation on the

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[1] *See* 41 M.J. 213, 229 n.* (1994).

substitute defense counsel. Resolution of these matters requires this Court to address two sub-issues:

1. WHETHER THE ORIGINAL TRIAL DEFENSE COUNSEL HAD PRIOR KNOWLEDGE OF AN ALLEGATION OF INEFFECTIVENESS OF COUNSEL, SO THAT AN ATTORNEY-CLIENT CONFLICT PRECLUDED COUNSEL FROM RESPONDING TO THE INITIAL SJA'S RECOMMENDATION AND THEREBY REQUIRED SERVICE OF THIS RECOMMENDATION ON SUBSTITUTE DEFENSE COUNSEL.

2. WHETHER EITHER OF THE TWO ADDENDA TO THE SJA'S RECOMMENDATION RAISE "NEW MATTER" THAT REQUIRED SERVICE ON THE SUBSTITUTE DEFENSE COUNSEL.

> Unfortunately, because of a factual gap in the record, we are unable to resolve the first sub-issue. Senator Sam Ervin, while serving as a Justice on the North Carolina Supreme Court, addressed in this manner an appellate court's problem in dealing with a factually deficient record:
>
> The unfortunate turn taken by this case in the court below calls to mind a bit of advice received by the writer of this opinion from his father, who was a member of the North Carolina bar for sixty-five years. When the writer embarked on the practice of law, his father gave him this admonition: 'Always salt down the facts first; the law will keep.' The trial bench and bar would do well to heed this counsel.
>
> In the very nature of things, it is impossible for a court to enter a valid judgment declaring the rights of parties to litigation until the facts on which those rights depend have been 'salted down' in a manner sanctioned by law.

Erickson v. Starling, 235 N.C. 643, 71 S.E.2d 384, 395-96 (1952).[2]

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[2] In the television series of yesteryear, Dragnet, Sgt. Joe Friday used to put it this way, "Just the facts, ma'am, just the facts!"

Because important facts regarding the first sub-issue are not "salted down," a remand to establish a factual record normally would be required. *See United States v. Cornelious*, 41 M.J. 397 (1995). However, here this action to resolve the first sub-issue is unnecessary. Our resolution of the second sub-issue requires a new SJA recommendation and convening authority action to remedy the errors in failing to serve the substitute defense counsel with the first addendum to the SJA's recommendation, which raised "new matter," and in failing to serve this same counsel with the second addendum, which discussed a new issue decided in the post-trial hearing.

FACTUAL BACKGROUND

On November 15, 1989, appellant, an officer with over 19 years of unblemished officer/enlisted service, randomly was selected to provide a urine sample for drug testing. During the test procedures, appellant told the drug test monitor that he believed his sample would come back positive because of the prescribed drugs he was taking. Subsequently, his urinalysis test report was positive for marijuana and cocaine.

Before and during trial appellant denied knowing use of illegal drugs. He asserted that a combination of innocent circumstances might explain his positive test result. According to appellant, he took prescription and non-prescription drugs, including opiates and barbiturates, for the continuing treatment of effects of injuries he had received in an accident years earlier, and also he used exotic herbal teas. The members rejected appellant's explanation, however, and convicted him of the alleged drug use. The granted issue arises primarily from questions about the effectiveness of the assistance of counsel in light of the possible conflicts of interest on the part of two lawyers involved in appellant's defense.

A

The second Court of Military Review opinion concluded that "there is some confusion as to whether Captain Watson

was detailed as defense counsel. . . ." Unpub. op. at 3. This confusion is quite understandable.

According to the record of trial, Captain Koza alone was detailed as appellant's counsel. As Captain Koza had been transferred prior to trial, the military judge properly informed appellant of his right to have his detailed counsel present, and appellant waived Koza's presence. Captain Willner, the individual military counsel, appeared alone in court to represent appellant.

Captain Watson, as the base area defense counsel, consulted and assisted the defense in trial preparation, took confidence from appellant, and collected clemency material. However, he never entered an appearance in court as a detailed counsel. Nonetheless, Major Willner, who was promoted to this rank after the trial, states in his affidavit that "Capt Watson was detailed to the case. . . ." In his affidavit, Major Willner also explains that the decision not to have Captain Watson sit at counsel table during the trial was based on "our recognition that trial counsel or a court member might ask Col Smith why he was willing to testify as a character witness considering that he had preferred the charges. His answer would have been that one of the defense counsel [Captain Watson] had advised him to sign the charges." (Emphasis added.)

When the prosecution called Captain Watson as a witness regarding a proper profferal, Captain Willner informed the judge that Captain Watson "has worked with me in preparing for this case. He has also taken confidences from Major Haney."

In a post-trial letter to the convening authority, appellant expressly challenged "the trial strategy [Captain Watson] helped develop or the assistance he provided. . . ." He further asserted that Captain Watson "was reluctant to invalidate his own work, since he was the prosecutor in April." Notwithstanding this confusion as to Captain Watson's professional relationship with appellant, the court below found that (a) appellant was fully aware of Captain Watson's prior involvement as the base chief of military justice and as the

officer before whom appellant's commander had sworn to the charges and (b) appellant had expressly requested Captain Watson to assist his individual military counsel. Accordingly, the court below ruled that no actual conflict of interest existed regarding Captain Watson's performance. Unpub. op. at 4.

B

The events concerning the role of Captain (later Major) Willner are equally confusing. On September 24, 1990, the SJA completed his initial recommendation and served appellant. On September 25, 1990, the SJA served Major Willner.

On October 26, 1990, the SJA prepared and forwarded to the convening authority the first addendum to his initial recommendation. Without indicating the date of their receipt in the SJA's office, the addendum included these documents that the defense had submitted:

> 1) Captain Willner's defense request for clemency, which included 34 attachments (approximately 59 pages) and addressed appellant's claim of innocence, 19 years of exceptional service, medical problems, and family stresses. The clemency request is dated October 4.
>
> However, on October 4 and October 12, the defense had requested extensions to file clemency matters; and the convening authority had granted the defense until October 25 for this purpose. Thus, the actual date of receipt is uncertain.
>
> 2) Appellant's request for release and/or a new trial, dated October 25, 1990, which included 6 attachments (approximately 63 pages.) This document questioned the advice of counsel that Haney waive a proper profferal of the charges. It asserted that there "were many problems with the evidence that was presented by my attorney and the manner in which he presented what was submitted and what was withheld." Appellant implied that Watson might have intentionally failed to present appellant's evidence of good character because Captain Watson "was responsible for bringing charges against me [and] was reluctant to

invalidate his own work since he was the prosecutor in April. I cannot, now, accept that the trial strategy he helped develop or the assistance he provided were in good faith." Appellant argued that a new trial was required because of "the possible ineffective counsel provided to me." Appellant also referred specifically to a letter, dated October 24, from his wife to the convening authority, regarding evidence that had not been used at trial.

3) Appellant's wife's letter to the convening authority (with two attachments, approximately 4 pages), which had been submitted directly and not through the area defense counsel. Mrs. Haney alleged that she and appellant had difficulty in working both with Captain Willner and with Captain Watson. She asserted that "our defense lawyers seem to be working harder for the prosecution than for us, their clients." She explained that counsel had failed to introduce evidence and call defense witnesses.

4) Captain Willner's submission of RCM 1105/1106, Manual for Courts-Martial, United States, 1984, matters, dated October 23, 1990, with three attachments (approximately 9 pages.) (This is not a quotation.)

In his first addendum, the SJA explained that defense counsel and appellant had asserted errors, including that appellant "received ineffective assistance of counsel" and that "a juror was asleep during a portion of the trial." As to the former, that addendum concludes, "I find from the record that Major Haney received a vigorous defense and was competently represented by Captain Willner, his trial defense counsel. Captain Watson was not a counsel in the case. . . ." (Emphasis added.) Reasoning that the assertion—supported by two affidavits—that a member of the court-martial had been sleeping during a portion of the trial "presents a significant problem," the SJA recommended that a post-trial session be convened to address this issue. However, the SJA did not serve defense counsel with a copy of this addendum to the recommendation.

On October 29, 1990, the convening authority, in line with the SJA's suggestion, ordered a post-trial hearing as to

whether any court member had been sleeping during any critical portion of the trial.

On October 31, 1990, at the opening of the post-trial hearing, Captain Willner moved to withdraw because of appellant's allegations of ineffective assistance of counsel. Willner asserted that appellant's request for release and/or new trial dated October 24, 1990, appeared to incorporate his wife's letter of October 24. After the military judge had appellant affirm his dissatisfaction with Captain Willner and his loss of confidence in his attorney's abilities, the judge ruled that this lack of trust rendered Captain Willner unable to provide effective advice, so it was good cause to relieve him as counsel. Captain Reigler replaced Willner as substitute defense counsel, and the military judge completed the post-trial session. On November 8, 1990, the military judge made findings of fact based on the post-trial hearing and provided Captain Reigler with a copy.

On November 9, 1990, the SJA submitted a second addendum to his recommendation. He noted that the post-trial hearing had been completed and that the judge had made findings of fact that no juror had slept during the trial. Captain Reigler, the substitute defense counsel, was not served with this addendum. On November 19, 1990, the substitute defense counsel examined the post-trial hearing record, some 6 days after the convening authority took action.

DISCUSSION

A

The rules of law to be applied in this case are clear and simple. However, because the critical facts in this case are not "salted down," we are thwarted in applying those rules.

An allegation that the original detailed defense counsel had rendered ineffective assistance would have precluded him from responding to the SJA's initial recommendation because of an attorney-client conflict of interest. On the other hand, in *United States v. Carter*, 40 M.J. 102 (CMA 1994), we held that post-trial responses to an SJA's recommendation made "prior

to notification of a claim of ineffectiveness of defense counsel are 'mentally free of competing interest . . . and there [is] not need for a substitute counsel." Id. at 105-06.

Here, there is no clear factual record of what the defense counsel knew and when he knew it as to claims of ineffective assistance of counsel. *See United States v. Cornelious*, 41 M.J. 397 (1995). The affidavit of Major Willner does not address this issue, and the record of trial contains no dates concerning the SJA's receipt of the defense post-trial submission. Ordinarily, a remand would be necessary to consider the granted issue in light of *Carter*. Id. at 398. However, this relief is not required because there is an independent basis for requiring a new convening authority's action in this case.

B

RCM 1106(f)(7), Manual for Courts-Martial, United States (1994 ed.), the version in effect at the time of the recommendation—which authorized the SJA to supplement his post-trial recommendation after receiving the comments of defense counsel—required: "When new matter is introduced after counsel for the accused has examined the recommendation, however, counsel for the accused must be served with the new matter and given a further opportunity to comment." According to the Discussion of this Rule, "new matter" includes "matter from outside the record of trial, and issues not previously discussed."

Although he did not enter an appearance as a counsel of record in this case, Captain Watson's involvement as defense counsel in this case is well documented. In his capacity as the base area defense counsel, he consulted with and assisted the defense in trial preparation and presentation, took confidences from appellant, and collected clemency matters (21 letters in appellant's clemency package are addressed to Captain Robert Watson, Area Defense Counsel). In his affidavit, Major Willner asserts that "Captain Watson was detailed to the case" and refers to him as "one of the defense counsel."

Under these circumstances, appellant's allegation of ineffective assistance of counsel deserved close scrutiny. *See*

United States v. Travolilla, 17 U.S.C.M.A. 395, 399, 38 C.M.R. 193, 197 (1968) (each appointed defense counsel is an integral part of the defense team and could not be absent unless excused by the accused); *see also United States v. Boone*, 42 M.J. 308, 313 (1995) ("Where an accused is represented by both civilian counsel and detailed military counsel, the performance of defense counsel is measured by the combined efforts of the defense team as a whole."). Accordingly, the SJA erred by not serving the first addendum on appellant's trial defense counsel. *See United States v. Leal*, 44 M.J. 235 (1996); *United States v. Jones*, 36 M.J. 438 (CMA 1993); *United States v. Norment*, 34 M.J. 224 (CMA 1992).

Moreover, the SJA erred by failing to serve on substitute defense counsel the second addendum, which addressed the issue of sleeping members. This issue had not been discussed in the original recommendation and was "new matter." *See United States v. Leal* and *United States v. Jones*, both *supra*; *United States v. Narine*, 14 M.J. 55 (CMA 1982); RCM 1106(f)(7) Discussion, Manual, supra.

This error is compounded by the convening authority's acting on appellant's case even before the substitute counsel had reviewed the record of the post-trial proceedings. We recently reaffirmed that the "essence of post-trial practice is basic fair play—notice and an opportunity to respond." *United States v. Leal*, *supra* at 237. The error here denied appellant these basic rights.

Before the court below on remand, appellant in his fifth assignment of error specifically challenged the findings of the military judge regarding the post-trial proceedings. Proper service of the second addendum on defense counsel would have afforded appellant the opportunity to present these matters initially to the convening authority, rather than to raise them first in an appellate court.

C

In light of these multiple errors, we must address whether the appellant was prejudiced. *See United States v. Hickok*, 45

M.J. 142 (1996) (counsel present to protect post-trial interest, procedural error tested for prejudice). In *United States v. Jones*, 44 M.J. 242, 244 (1996), we affirmed the principle that "injection of lnew matter'" is "presumptively prejudicial." Here, the Government has not rebutted that presumption. *Accord United States v. Leal, supra.*

"Ordinarily, we will not speculate on what the convening authority might have done if there had been full compliance with RCM 1106(f)(7)." *United States v. Jones*, 44 M.J. at 244; cf. *United States v. DeGrocco*, 23 M.J. 146 (CMA 1987). Certainly, we should not speculate that the convening authority would have granted no relief if he had been able to consider appellant's significant and substantive response to the two addenda to the SJA's recommendation. On remand appellant will have the opportunity to assure, that the facts are "salted down" and that a convening authority will be able to evaluate objectively the claims he has raised.

The decision of the United States Air Force Court of Military Review and the.action of the convening authority are set aside; the record of trial is returned to the Judge Advocate General of the Air Force for submission to a different convening authority for a new recommendation and action. If necessary to establish facts as to Captain Watson's involvement and other ineffectiveness-of-counsel issues, the convening authority may order an evidentiary hearing. *See United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

Judge SULLIVAN concurs.

CONCUR BY: COX; GIERKE (In Part)

CONCUR: COX, Chief Judge (concurring):

Black's Law Dictionary defines "addendum" as "[a] thing that is added or to be added; a list or section consisting of added material." Id. at 37 (6th ed. 1990). Therefore, in my view, an "addendum" is either redundant and not necessary, or is always new matter. *See United States v. Leal*, 44 M.J. 235, 240 (1996) (Cox, C.3., dissenting in part and concurring in the result). In this case, the information supplied by the staff

judge advocate was clearly significant; and, thus, the addendum containing it should have been served on defense counsel.

Accordingly, I concur.

DISSENT BY: CRAWFORD; GIERKE (In Part)

DISSENT:

GIERKE, Judge (concurring in part and in the result):

I agree with the result reached by the majority but I am troubled by the majority's treatment of the question of "new matter" in the first addendum. The majority does not identify what part of the staff judge advocate's [SJA's] addendum was "new matter" and fails to articulate a legal basis for concluding that it was new matter.

Appellant asserted that he was inadequately represented, and the SJA responded that appellant was ably represented. This response was not "new matter." See RCM 1106(f)(7), Discussion, Manual for Courts-Martial, United States (1994 ed.) ("'New matter' does not ordinarily include any discussion by the staff judge advocate . . . of the correctness of the initial defense comments on the recommendation.").

Appellant also asserted that there was a conflict of interest caused by Capt Watson's membership on the defense team. The SJA responded that "Captain Watson was not a counsel in the case." The record does not reflect the basis for the SJA's response. If the SJA's basis for this response was information from outside the record, the response was "new matter." RCM 1106(f)(7), Discussion. If, however, the SJA's response was merely a conclusion based on the record, it was not new matter but merely a comment on the correctness of the defense assertion. While the record reflects that Capt Watson did not enter a formal appearance in the case, was not introduced as a member of the defense during trial, and did not sit at the counsel table at trial, I cannot determine if that was the basis for the SJA's comment.

Notwithstanding my inability to determine the factual basis for the SJA's comment, I believe that his comment was new matter because it introduced a new issue. Appellant's complaint was that he was not competently represented

because Capt Watson "was reluctant to invalidate his own work." This complaint was premised on Capt Watson's dual role as a member of the defense team, having previously acted for the prosecution in connection with profferal of charges. The SIA's response did not address the quality of Capt Watson's performance or the impact of his dual role on the defense representation, but instead raised a new factual issue: whether Capt Watson was in fact a member of the team.

This new issue blindsided the defense. Capt Willner (the individual counsel) had stated on the record that Capt Watson had assisted in the preparation of appellant's case and had "taken confidences" from appellant as part of that preparation. Many of the documents presented to the convening authority on clemency were addressed to Capt Watson. The SJA mentioned none of these indicia of Capt Watson's participation. Instead, the SJA made a factual assertion, at odds with the evidence of record, that appellant's factual premise for his claim of ineffective representation was invalid. Since this addendum was not served, appellant had no opportunity to set the record straight for the convening authority. For these reasons I join the majority in holding that the record must be returned for a new post-trial recommendation and service on conflict-free defense counsel.

Turning to the second addendum on the issue of the sleeping court member, I disagree with the majority on the applicable standard of review as well as its conclusion that the procedural error was prejudicial. I question whether this was truly an addendum or an original recommendation. Under either classification, however, I agree that service on the defense was required. Since appellant was represented by conflict-free counsel at this point, however, the SIA's failure to serve the second addendum must be tested for prejudice. *See United States v. Hickok*, 45 M.J. 142 (1996); *United States v. Pierce*, 40 M.J. 149 (CMA 1994); *United States v. Moseley*, 35 M.J. 481 (CMA 1992). I find no prejudice.

The sleeping-juror issue was an allegation of legal error, not part of a clemency petition. Thus, the presumption of prejudice applied in *United States v. Leal*, 44 M.J. 235, 237

(1996), and *United States v. Jones*, 44 M.J. 242, 244 (1996), does not apply because this case does not involve the convening authority's unfettered prerogative to grant clemency. Instead, appellant is entitled to relief only if his allegation of legal error had merit. He is not entitled to an erroneous recommendation from the SIA or an erroneous decision from the convening authority. See *United States v. Welker*, 44 M.J. 85, 88-89 (1996).

The issue of the sleeping court member was thoroughly investigated at a post-trial evidentiary hearing. Appellant presented four witnesses who asserted that a member sitting to the left of the president had been sleeping during the court-martial. Four of the five court members were questioned. One court member, who had been sitting to the right of the president, had been reassigned and was unavailable to testify. The four court members who were questioned all denied sleeping or seeing any other member sleeping. Trial counsel and defense counsel from the original trial both testified that they saw no members sleeping. The military judge stated on the record that he had noticed no one sleeping. The Court of Criminal Appeals reviewed the issue and concluded that it was without merit. On this record, there is no way I can say that appellant was entitled to a different result on this issue.

For the foregoing reasons, I disagree with the majority's conclusion that failure to serve the second addendum entities appellant to relief. However, based on the SJA's failure to serve his first addendum, I concur in the result reached by the majority.

CRAWFORD, Judge (dissenting):

The majority concludes that because of "new matter" in the staff judge advocate's (SJA) second addendum, "there is an independent basis for requiring a new convening authority's action in this case." 45 M.J. 447, 451. I agree with the majority that "the SJA erred by failing to serve on substitute defense counsel the second addendum, which addressed the issue of sleeping members." *Id.* at 452. The majority asserts: "This error is compounded by the convening authority's acting on appellant's case even before the substitute counsel had reviewed the record of the post-trial proceedings." Id. at 452.

But any error for failing to serve the second addendum concerning the sleeping court members would not affect the substantial rights of appellant because both the prosecutor and the defense counsel agreed with the military judge that such an allegation was untrue. Thus, service of the second addendum for a defense response would now be a futile exercise.

Additionally, failure of defense counsel to raise this issue below constitutes waiver, absent establishing good cause or manifest injustice. *United States v. Townsend*, 43 M.J. 205, 212 (1995) (Crawford, J., dissenting). Neither has been shown in this case.

APPENDIX E

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

UNITED STATES

v.

Major CHARLES M. HANEY, JR., 265-04-8987
United States Air Force

ACM 29000 (f rev)

26 May 1994

Sentence adjudged 19 July 1990 by GCM convened at Peterson Air Force Base, Colorado. Military Judge: Robert N. Spencer.

Approved sentence: Dismissal, confinement for 8 months, and forfeiture of $750 pay per month for 12 months.

Appellate Counsel for Appellant: Kevin J. Barry, Esq. (argued), Colonel Jay L. Cohen, Lieutenant Colonel Frank J. Spinner, Lieutenant Colonel G. Michael Lennon, and Captain Robert A. Parks.

Appellate Counsel for the United States: Major Jules D. Silberberg (argued), Colonel Jeffery T. Infelise, and Lieutenant Colonel Thomas E. Schlegel.

Before

DIXON, GRUNICK, and PEARSON
Appellate Military Judges

OPINION OF THE COURT

UPON FURTHER REVIEW

GRUNICK, Judge:

We are reviewing this case for the second time. Our first consideration included review of appellant's ten assignments of error and oral argument on selected issues. We affirmed appellant's conviction in an unpublished opinion on 26 August 1992.

Substitute appellate defense counsel in an Addendum to the Supplement to Petition for Grant of Review to the Court of Military Appeals, dated 6 April 1993, asserted five issues plus an allegation of inadequacy of appellate representation. The Court of Military Appeals viewed the issues raised by appellate defense counsel as matters that were not raised before this Court in our initial consideration of this case. They set aside our prior affirmance and remanded this case to us for further review.

Pursuant to the Court of Military Appeals direction, the case has been returned to this Court for further review. We again conducted oral arguments and considered appellant's seven assignments of error: (1) Ineffective assistance of trial defense counsel; (2) an assistant to the defense team had a conflict of interest; (3) the military judge erred during instructions; (4) comments by the convening authority constituted unlawful command influence; (5) the military judge erred in his finding a court member was not asleep during a portion of the trial; (6) the military judge was appointed in violation of the appointments clause; and (7) the trial and appellate judges were not appointed for fixed terms.

FACTS

On 15 November 1989, appellant was randomly selected to provide a urine sample for drug testing. During the test procedures, appellant told the drug test monitor he believed his sample would come back positive because of the prescribed drugs he was taking. The test results reported appellant's sample was positive for marijuana and cocaine. Appellant was convicted of one specification each of use of marijuana and cocaine, in violation of Article 112a, UCMJ. Before a panel of officers he was sentenced to a dismissal, confinement for 8 months, and forfeitures of $750 per month for 12 months. The convening authority approved the findings and sentence.

During our initial review of appellant's case, we considered the ten errors submitted by appellant, four of them submitted to us pursuant to *United States v. Grostefon*, 12 M.J.

431 (C.M.A. 1982). Article 66(c), UCMJ, permits the courts of military review to "affirm only such findings of guilty and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." We performed our statutory duties and rendered a decision on 26 August 1992.

The Court of Military Appeals set aside our decision on 23 June 1993 and returned it to us because substitute appellate defense counsel, "for the first time on appeal raised five additional issues." In fact, many of the issues briefed before the Court of Military Appeals were raised before us in our prior review of this case and resolved by our previous decision. Because appellant did submit several of these alleged errors during our prior review, we decline to consider these previously resolved assertions as newly-raised issues. In setting aside our previous decision, the Court of Military Appeals cited no error of law. We therefore incorporate, by reference, our previous decision of 26 August 1992, deciding our prior review resolves many of the issued raised by appellant. We confine our discussion in this opinion to the ineffective assistance of council issues recently briefed and argued before us.

INEFFECTIVE ASSISTANCE OF COUNSEL

Although we resolved a broad-brush allegation of ineffective assistance of counsel in our first decision, we will reconsider the specifics raised by appellant's assertion. Appellant claims his trial defense counsel, Major W, never challenged the chain of custody for handling urine samples, never offered evidence to show the absence of appellant's drug abuse, and failed to present available evidence on good military character.

In his affidavit responding to this complaint, Major W states he interviewed laboratory personnel to determine if there was any break in custody or possibility of tampering. He states that after conducting an extensive investigation he discovered there was no indication of either tampering or a break in the chain of custody.

The second area of appellant's complaint centers on the failure to call witnesses to raise a reasonable doubt. Trial defense states he discussed with appellant potential damaging testimony from a proposed defense expert, Colonel Levisky. Major W also discusses in great detail the other individuals he interviewed and the investigation he conducted to explore appellant's theories on how his urine sample came to test positive.

The final area of appellant's complaint concerns the extensive use of affidavits on good military character and the failure to call live character witnesses. Major W in his affidavit states he selected the individuals to call on the issue of good military character after consulting with his client who agreed with his analysis. Defense counsel goes into extensive detail in his affidavit why three potential character witnesses were not called to testify.

The standard by which effectiveness of counsel is measured is governed by *Strickland v . Washington*, 466 U.S. 668 (1984). Appellant must demonstrate first, that counsel was deficient, and, second, the claimed deficiency was prejudicial. Absent either, the claim must fail. 466 U.S. at 697.

We resolve the factual issues against appellant. We believe the weight of the evidence establishes trial defense counsel did consult with his client over trial preparation, strategy and made timely recommendations. Trial defense counsel's affidavits were specific and responsive to his preparation and to the consultations with appellant over trial strategy.

We view trial defense counsel's decisions not to challenge the chain of custody, call potential character witnesses, or present certain evidence as tactical decisions reasonable under the circumstances then prevailing. *United States v. Matthews*, 16 M.J. 354, 363-64 (C.M.A. 1983). Applying the *Strickland* test to appellant's arguments, trial defense counsel's affidavits, and after reviewing the entire record of trial, we are convinced appellant's trial defense counsel's representation was not deficient and appellant was not deprived of a fair trial.

We hold appellant was not denied the effective assistance of counsel.

CONFLICT OF INTEREST

Appellant complains he was denied due process of law and effective assistance of counsel when Captain W swore his commander to the charges during the preferral process and then "switched sides" becoming the area defense counsel and eventually assisting appellant in the preparation of his case.

The affidavits from the trial defense counsel, Major W, show that appellant was fully aware of Captain W's prior involvement as the base chief of military justice and the person who swore appellant's commander to the charges. We are convinced appellant expressly requested the new area defense counsel, Captain W, who provided assistance to the visiting circuit defense counsel, Major W. When the military judge questioned appellant on who represented him, appellant indicated the circuit defense counsel and not Captain W. Later in the trial when Captain W was called to testify by the government on the circumstances of the preferral, Major W advised the military judge that Captain W had assisted him in trial preparation and had taken confidences from appellant. (R. 255.) Although there is some confusion as to whether Captain W was detailed as defense counsel to appellant's case, it is clear he did, as the base area defense counsel, consult with and offer assistance to the defense team. Captain W did not participate as a trail defense counsel, but after the trial was completed he did assist Major W in collecting clemency matters, however, Major W actually signed and presented appellant's clemency package to the convening authority.

Appellant asserts he was never made aware of Captain W's potential conflict of interest and the military judge was never made aware of Captain W's role in helping the defense. On both issues the affidavits from counsel and the record of trial convinces us appellant and the military judge were aware of his defense participation.

Although appellant would cast a sinister motive for Captain W assisting Major W, we find appellant knowingly and intelligently waived any perceived conflict and Captain W's assistance to Major W did not prejudice appellant's

representation. *United States v. Smith*, 36 M.J. 459 (C.M.A. 1993).

In this case, there was no actual conflict of interest affecting Captain W's performance and appellant suffered no prejudice.

REMAINING ISSUES

We have examined the remaining assignments of error not dispose of by our previous decision and before us for the first time. Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error. R.C.M.920(f). In this case we find waiver and no plain error.

We also find no merit to appellant's unsubstantiated assertion of unlawful command influence. Appellant complains that Captain W reported to him derogatory remarks about his case attributed from the convening authority. Captain W in his affidavit denies hearing or reporting to appellant any inappropriate comments from the convening authority. During the trial this issue was never raised by the defense and our review of the voir dire discloses no mention by any court member of any prior knowledge of this case or ever hearing any comments about appellant by the convening authority. There is insufficient evidence to support the allegation. Mere assertions are not enough. *United States v. Bell*, 34 M.J. 937 (A.F.C.M.R. 1992).

The appellant contends he was denied due process and equal protection since military trial and appellate judges do not enjoy fixed terms and are selected in violation of the Appointments Clause. Both of these issues have been resolved adversely to appellant's position and they are without merit. *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992); *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992), *affirmed*, ___ U.S. ___ 114 S. Ct. 752, 127 L. Ed. 2d 1, (1994).

The findings and sentence are correct in law and fact, the sentence is appropriate, and not error prejudicial to the

substantial rights of the appellant was committed. Accordingly, the findings and sentence are

AFFIRMED.

Chief Judge DIXON and Judge PEARSON concur.

APPENDIX F

UNITED STATES COURT OF MILITARY APPEALS

UNITED STATES, Appellee

v.

Charles M. HANEY (265-04-8987), Appellant

USCMA Dkt. No. 93-0157/AF
CMR Dkt. No. 29000

ORDER

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Military Review, we note that substitute counsel, in his Addendum to the Supplement to the Petition for Grant of Review dated April 6, 1993, has for the first time on appeal raised five additional issues plus an issue alleging inadequacy of representation on the appellate level since the issues raised pursuant to *United States v. Grostefon*, 12 MJ 431 (CMA 1982), "were neither adequately stated nor briefed" to this Court. In view of the issues raised by substitute appellate defense counsel, which matters were not before the Court of Military Review in its initial consideration of this case, it is by the Court the 23rd day of June, 1993

ORDERED:

That the decision of the United States Air Force Court of Military Review is set aside. The record of trial is returned to the Judge Advocate General of the Air Force for remand to that court for consideration of the issues raised for the first time before us. Following these proceedings, Article 67(a), Uniform Code of Military Justice, 10 USC § 867(a) (1989), will apply.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (PARKS)
Appellate Government Counsel (INFELISE)

APPENDIX G

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

UNITED STATES

v.

Major CHARLES M. HANEY, JR., 265-04-8987
UNITED STATES AIR FORCE

ACM 29000

26 August 1992

Sentence adjudged 19 July 1990 by GCM convened at Peterson Air Force Base, Colorado. Military Judge: Robert N. Spencer (sitting alone).

Approved sentence: Dismissal, confinement for 8 months, and forfeiture of $750 pay per month for 12 months.

Appellate Counsel for the Appellant: Colonel Jeffrey R. Owens and Major Ronald G. Morgan.

Appellate Counsel for the United States: Colonel William R. Dugan, Jr., Lieutenant Colonel Brenda J. Hollis, Major Paul H. Blackwell, Jr., and Major Morris D. Davis.

Before

O'HAIR, SNYDER, MILLS, and GRUNICK
Appellate Military Judges

OPINION OF THE COURT

GRUNICK, Judge:

Appellant was convicted of one specification each of use of marijuana and cocaine, in violation of Article 112a, UCMJ. Before a panel of officers he was sentenced to a dismissal, confinement for 8 months, and forfeitures of $750 per month for 12 months. The convening authority approved the findings and sentence.

Appellant submits ten errors for our review, four of them being submitted to us pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). The facts in this case are relatively straightforward. On 15 November 1989, appellant was randomly selected to provide a urine sample for drug testing. During the test procedures, appellant told the test monitor he believed his sample would come back positive because of the prescribed drugs he was taking. The test results for appellant reported positive for marijuana and cocaine.

In his first assignment of error, appellant attacks the propriety of the preferral of charges brought against him. Appellant's commander testified as a character witness during findings, and announced that despite his signing the charges under oath, he did not believe appellant was guilty. The commander was neither coerced nor forced by anyone to take the preferral oath or sign appellant's charges. What was true, to the accuser's best knowledge and belief, was the fact there was a positive urinalysis and he did not equate this with the appellant's guilt. When this defective preferral was discovered during the trial, the military judge did a superb job of questioning the appellant and his counsel over their desire on how to proceed. Although the appellant now asserts this was a jurisdictional defect, we view it as a procedural error that can be waived by failing to object at trial. We find the appellant waived this defective preferral and specifically elected to continue. *See United States v. Miller*, 31 M.J. 798 (A.F.C.M.R.) and *United States v. Johnson*, 72 B.R. 317 (1947) along with the cases cited therein.

Appellant next complains the military judge erred in permitting testimony about a previous positive urinalysis provided over 10 years before the current sample. Had evidence of a previous positive urinalysis been offered to attack the appellant's character for truthfulness or to impeach his testimony at trial, this issue might have some merit. In this case, when the sample was being collected, the appellant made a statement to the test administrator that the current sample was, "going to come back positive". As expected, this generated a dialogue between the appellant and the test

administrator that included some references by the appellant to a previous positive test administered against him that was found to be invalid. No evidence of a previous positive urinalysis was admitted against appellant. In permitting testimony from the urinalysis test administrator, the military judge properly ruled the appellant's statements were admissions of a party-opponent, admissible under Mil. R. Evid. 801(d)(2)(A). The limiting instruction properly advised the court members that there was no evidence of a previous positive urinalysis or that appellant had ever used a controlled substance on a previous occasion. We find appellant's statements were properly admitted for the limited purpose of proving his knowledge that he used controlled substances.

Appellant also complains the military judge improperly denied a pretrial motion and motion at trial to compel the appearance of two OSI agents from another base that had recently conducted tests over the integrity of tamper resistant tape. This issue is similar to the witness determination made in *United States v. Hargove*, 33 M.J. 515 (AFCMR 1991). The military judge properly found the requested witnesses were not necessary. The defense was able to bring out the evidence the requested witnesses would have discussed. Upon cross-examination, SSgt Wallerstedt, the individual responsible for the collection and chain of custody of appellant's sample, testified that removal of the tamper resistant tape, without detection, was difficult, but not impossible. The appellant was not denied a fair trial when OSI witnesses were not produced as requested. *See United States v. Jouan*, 3 M.J. 136 (C.M.A. 1977); *United States v. Daniels*, 23 U.S.C.M.A. 94, 96, 48 C.M.R. 655, 657 (1974).

During cross-examination of appellant, in a duplication of defense counsel's direct examination, trial counsel began a question: "[L]ook them in the eyes and tell them . . . ." This tactic was a feeble attempt by both counsel to enhance or damage the appellant's credibility with eye contact. It is obvious, in context, that trial counsel's question was an effort to explore the appellant's several theories on how his sample was returned positive. The military judge properly permitted the question.

A post-trial hearing was conducted on 31 October 1990, to look into allegations that one or more of the court members were asleep during appellant's trial. Appellant alleges the military judge was in error by requiring appellant's former counsel to testify at this hearing on the attentiveness of the court members. We view this hearing, with the efforts of all trial participants to reconstruct their observations of court members during trial, to be similar to the reconstruction of an incomplete record of trial. Full and complete testimony from the trial defense counsel did not violate an attorney-client relationship or create a conflict of interest. The questioned testimony was limited to the administration of the trial and did not touch the counsel's relationship with his client. We find no error. *See United States v. Baca*, 27 M.J. 110 (C.M.A. 1988).

The appellant also raises the issue of whether the record of trial fails to adequately document that the convening authority considered post-trial defense submissions prior to his taking action. We are convinced all clemency matters submitted by appellant were provided to the convening authority, prior to his taking action on appellant's case. Although each submission was not described in the staff judge advocate's recommendation, the general nature of the post-trial submissions were described and the exact number of attachments referenced. The convening authority was advised that he "must" consider the post-trial submissions of appellant. We find no need for a new action of the convening authority in appellant's case. *See United States v. Craig*, 28 M.J. 321 (C.M.A. 1989).

We resolve the remaining four invited assertions of error adversely to appellant. Having examined the record of trial, the assignment of errors, and the government's reply, we have concluded the complaint of inadequacy of counsel to be devoid of merit. The allegation of a sleeping court member was appropriately resolved during the post-trial hearing and we adopt that determination, finding no error prejudicial to the substantial rights of the appellant. We also conclude that the findings and sentence are correct in law and fact, and the sentence is appropriate. Accordingly, the findings of guilty and sentence are

AFFIRMED.

Senior Judge O'HAIR, and Judge MILLS concur.

Judge SNYDER did not participate.

OFFICIAL

LAURA L. GREEN
Clerk of Court
Air Force Court of Military Review